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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

AUTOZONE, INC.,

Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Court of Appeals err when it ruled that the failure, during a union election campaign, to grant a wage adjustment which was undetermined at the inception of union organizing activities constituted an unfair labor practice under the National Labor Relations Act, particularly where employees were never guaranteed a specific adjustment and the employer acted in good faith, upon advice of counsel, and in an effort to avoid influencing the outcome of the election?

2. Did the Court of Appeals err when it ruled that an employer violates the Act when it merely informs employees of its previous experiences with strikes, particularly where the employer informs employees of striker reinstatement rights?

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The parties and attorneys involved in the proceedings in the court below, the Court of Appeals for the Sixth Circuit, are AutoZone, Inc., the Petitioner, and the National Labor Relations Board, the Respondent.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW ii

TABLE OF CONTENTS iii

INDEX TO APPENDICES v

TABLE OF AUTHORITIES vi

OPINION BELOW 1

STATEMENT OF JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 2

29 U.S.C. § 158 2

STATEMENT OF THE CASE 3

A. Reasons for Granting Petitioner's Writ 3

B. Procedural Background 4

C. Factual Background 5

ARGUMENT 6

A. Petitioner Lawfully Refrained From Making a Decision as to the Timing and Amount of a Wage Adjustment to Avoid Influencing the Outcome of the Election, While Explaining to Employees the Legal Basis for Its Decision .. 6

(1) Summary of the Argument 6

(2) History of General Adjustments at Petitioner's Distribution Centers 7

(3) The Court Below Erred in Concluding That Petitioner Violated the Act Where Petitioner Merely Informed Employees of the Legal Restrictions Guiding Its Decision With Regard to Wage Adjustments 11

TABLE OF CONTENTS – Continued

Page

(4) The Court's Imposition of 8(a)(3) Liability Was Clearly Unwarranted Because Petitioner Had No Established Past Practice of Granting Wage Adjustments..... 15

B. The Court Below Improperly Disregarded the Written Text of a Campaign Speech to Find That Petitioner's Noncoercive Expressions of Opinion on Union Matters Violated the Act.. 25

C. Employees Were Informed of Striker Reinstatement Rights; Therefore, the Court Below Was Clearly Wrong in Concluding That Petitioner's References to Strikes Constituted a Violation of the Act 28

CONCLUSION 30

INDEX TO APPENDICES

Opinion of the Court of Appeals for the Sixth Circuit ..... App. 1

Decision, Order and Direction of Second Election by National Labor Relations Board ..... App. 25

Decision of Administrative Law Judge ..... App. 29

TABLE OF AUTHORITIES

Page

CASES

Atlantic Forest Prod., Inc., 282 N.L.R.B. 855 (1987) 11, 13

Bowling Green-Warren County Community Hosp. Corp. v. NLRB, 756 F.2d 41 (6th Cir. 1981).. 14, 22, 23

Cutter Lab., Inc., 221 N.L.R.B. 161 (1975)..... 11

Emory Convalescent Home, 260 N.L.R.B. 540 (1992) 27

Florida Steel Corp. v. NLRB, 587 F.2d 735 (5th Cir. 1979).....26, 29

Free-Flow Packaging Corp. v. NLRB, 566 F.2d 1124 (9th Cir. 1978).....18, 19, 20

Gossen Co., 254 N.L.R.B. 339 (1981), *modified on other grounds*, 719 F.2d 1354 (7th Cir. 1983)..... 29

Great Atl. & Pac. Tea Co., 192 N.L.R.B. 645 (1971) 12, 13

Honey Elec., Inc., 138 LRRM 1014 (1991), *aff'd in part, rev'd in part*, 964 F.2d 543 (6th Cir. 1992)..13, 14

J.J. Newberry Co. v. NLRB, 645 F.2d 148 (2d Cir. 1981).....15, 17

NLRB v. Big Three Indus. Gas & Equip. Co., 441 F.2d 774 (5th Cir. 1971)..... 14

NLRB v. Cleveland Trust Co., 214 F.2d 95 (6th Cir. 1954)..... 22

NLRB v. Pentre Elec., Inc., 998 F.2d 363 (6th Cir. 1993).....26, 27

NLRB v. Planter's Peanuts, 574 F.2d 400 (8th Cir. 1978).....24, 25

TABLE OF AUTHORITIES – Continued

Page

NLRB v. Service Garage, Inc., 668 F.2d 247 (6th Cir. 1982) 14, 17, 23, 24

Otis Hosp., 222 N.L.R.B. 402 (1976), *aff'd*, 545 F.2d 252 (1st Cir. 1976) 15, 16

Peabody Coal Co. v. NLRB, 725 F.2d 357 (6th Cir. 1984) 21

Plasticraft, Inc. v. NLRB, 586 F.2d 185 (10th Cir. 1978) 18

PPG Indus., 247 N.L.R.B. 941 (1980) 29

Rosaeurs Supermarkets, Inc., 300 N.L.R.B. 709 (1990) 13

Stokely-Van Camp, Inc. v. NLRB, 722 F.2d 1324 (7th Cir. 1983) 20

STATUTES

28 U.S.C. § 1254(1) 1

NLRA § 10(f), as amended, 29 U.S.C. § 160(f) 1

NLRA § 8(a)(1), as amended, 29 U.S.C. § 158(a)(1) *passim*

NLRA § 8(a)(3), as amended, 29 U.S.C. § 158(a)(3) 2, 15, 18, 21, 24

NLRA § 8(c), as amended, 29 U.S.C. § 158(c) 3, 27

OPINION BELOW

The opinion of the Court of Appeals for the Sixth Circuit, which is unpublished, appears in the Appendix at App. 1.

STATEMENT OF JURISDICTION

The Court of Appeals for the Sixth Circuit entered its opinion and judgment on April 24, 1996. On June 14, 1996, the Court of Appeals for the Sixth Circuit entered an Order to stay the mandate pending this Court's disposition of this Petition for Writ of Certiorari. Petitioner filed its Petition for Writ of Certiorari within ninety days of the Notice of Entry of Judgment. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The Court of Appeals for the Sixth Circuit had jurisdiction to hear Petitioner's Petition for Review of the decision of the National Labor Relations Board, which is a final agency action that disposes of all claims to all parties, pursuant to Section 10(f) of the National Labor Relations Act as amended, 29 U.S.C. § 160(f). That section provides in pertinent part:

> Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States Court of Appeals in the circuit wherein . . . such person resides or transacts business . . .

Petitioner's corporate headquarters is located in Memphis, Tennessee, and it transacts business in Ohio. Therefore, this matter was within the jurisdiction of the Court of Appeals for the Sixth Circuit.

STATUTORY PROVISIONS INVOLVED

The text of the following pertinent statutory provisions is set forth below:

29 U.S.C. § 158

Unfair labor practices

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer –

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

. . .

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an

agreement: *Provided further,* That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

. . .

(c) Expression of views without threat of reprisal or force or promise of benefit

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

STATEMENT OF THE CASE

A. Reasons for Granting Petitioner's Writ.

The decision of the Sixth Circuit Court of Appeals, which found that Petitioner violated the Act by withholding in good faith, and upon advice of counsel, a wage adjustment which was undetermined at the inception of union organizing activities, is contrary to Board law and circuit law. Employers are regularly placed in the precarious position Petitioner faced during the course of the union organizing campaign conducted here. Due to the frequency of such dilemmas occurring and the often conflicting guidelines developed in Labor Board and circuit court decisions, elucidation by this Honorable Court on the issue of wage adjustments in the context of a union campaign is appropriate and warranted.

B. Procedural Background.

This appeal is the culmination of events arising out of an unsuccessful organizational attempt conducted by the General Drivers, Warehousemen and Helpers, Local No. 28, International Brotherhood of Teamsters, AFL-CIO (hereinafter the "union") among employees of Petitioner's Greenville, South Carolina Distribution Center. Pursuant to a Stipulated Election Agreement, an election was held on March 5, 1993. In a unit of more than 200 voters, 135 votes were cast against union representation and only 57 votes were cast in favor of representation. Two challenged ballots were cast.

The union filed objections which were consolidated with certain complaints issued by the Regional Director regarding various unfair labor practice charges filed by the union. A hearing took place on December 6 and 13-16, 1993, and the Administrative Law Judge (hereinafter "ALJ") rendered his decision on March 28, 1994.

The ALJ dismissed numerous objections, finding them to be without merit. However, the ALJ found that AutoZone unlawfully withheld a wage increase during the union campaign. Petitioner then filed exceptions to the ALJ's decision with the National Labor Relations Board (hereinafter "Board") on May 12, 1994. The Board, without explanation, affirmed the ALJ's decision and order. 315 N.L.R.B. No. 21 (1994). Based on serious errors contained in the ALJ's decision and order, Petitioner filed a petition for review to the Court of Appeals for the Sixth Circuit (hereinafter "court below") on October 12, 1994.

The court below rendered its decision on April 24, 1996, denying AutoZone's petition to set aside the decision of the Board and granting in full the Board's cross-application for enforcement of its order. Based on serious errors contained in the decision of the court below and the need for guidance in this important area of national labor relations policy, Petitioner filed the instant Petition for Writ of Certiorari to this Court.

C. Factual Background.

Petitioner is engaged in the distribution and sale of automotive parts. During 1993, Petitioner operated five distribution centers located one each in Arizona, Texas, Louisiana, Tennessee, and South Carolina. The union waged its campaign in the Greenville, South Carolina, Distribution Center by distributing literature and paraphernalia to Petitioner's employees, holding meetings, and soliciting support. A representation petition was filed on January 7, 1993.

During the period preceding the election, which was held on March 5, 1993, Petitioner instructed its supervisors not to threaten, intimidate, make promises, or surveil employees. In addition, Petitioner presented written campaign speeches to enable employees to make an informed decision regarding union representation. Ferguson, the Greenville Distribution Center Manager, and Roberts, the Vice President of Distribution, sought legal advice during the course of the campaign to ensure compliance with the Act.

In January 1993, Petitioner became concerned with the legality of moving forward with any wage adjustments during the course of the campaign. Petitioner's concerns were magnified by the fact that the amount of any wage adjustment, which had been sporadic in nature, was not finalized prior to the filing of the union's petition, and thus communicated same to legal counsel. Under the circumstances, Petitioner was in a dilemma: If Petitioner proceeded with a wage adjustment during the height of the union campaign, it would most certainly have been accused of "vote buying." In an effort to *avoid* the filing of unfair labor practice charges and "vote buying" allegations by the union, a decision was made not to proceed with a decision regarding any wage adjustments at the Greenville Distribution Center.

ARGUMENT

A. Petitioner Lawfully Refrained From Making a Decision as to the Timing and Amount of a Wage Adjustment to Avoid Influencing the Outcome of the Election, While Explaining to Employees the Legal Basis for Its Decision.

(1) Summary of the Argument.

In its decision, the court below found that: (1) Petitioner's past practice of granting wage adjustments in its Greenville facility has historically been erratic both in timing and in amount (App. 3-4, 101); (2) there is no guarantee that employees at any of Petitioner's facilities will receive a wage adjustment (App. 3-4, 101); (3) wage adjustments are not dependent upon inflation rates, but instead upon a market analysis of the areas in which the individual distribution centers are located (App. 3-4, 101-02); (4) wage adjustments among the individual facilities, as well as among the individual classifications of employees, vary across the board (App. 3-4, 105-06); (5) employees in Greenville were never guaranteed a specific wage adjustment for 1993 (App. 3-4, 101-02); and (6) Petitioner had not finalized a decision regarding a wage adjustment for Greenville employees when the union filed its petition. (App. 4-5, 103.)

Despite the erratic nature of wage adjustments at Petitioner's facilities, the court below nevertheless concluded that Petitioner unlawfully withheld a wage adjustment. Petitioner shows it did *not* violate the Act when it merely informed employees of the legal restrictions guiding its decision during the representation proceedings with regard to wage adjustments. As a result, the appellate court's decision must be reversed.

(2) History of General Adjustments at Petitioner's Distribution Centers.

Petitioner's past practice with regard to wage adjustments is *undisputed*. Petitioner maintains two types of wage adjustment programs for its employees: (1) normal progression raises where employees receive established "step" raises during the first two years of their employment;[1] and (2) general adjustments, given sporadically not in predetermined amounts, which vary across the board among the different job classifications to employees with more than two years of service. (App. 60.) The second category of wage adjustments is the category in dispute.

Unlike the normal progression raises, general adjustments are given sporadically and are directly tied to a market analysis of the area in which each distribution center is located.[2] (App. 3-4, 60.) There is *no* guarantee that an adjustment will be given on a yearly basis. (App. 3, 61.) The history of general adjustments at the Greenville Distribution Center illustrates the sporadic nature of wage increases. That facility opened in October 1986. It was not until *1990* that employees received a general adjustment; they did not receive one in 1987, in 1988 or until late in 1989. (App. 20, 101.)

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[1] For example, at the Greenville Distribution Center, new employees are reviewed at intervals of six months, one year, one-and-a-half years, and two years, receiving a set increase after each review. Before, during, and after the union campaign, employees with less than two years of service were given their normal progression raises in accordance with the pay scale in place at the Greenville Distribution Center.

[2] As the Board correctly observed, general adjustments are not "cost of living adjustments" because (1) not everybody gets the same increase, if any; and (2) the general adjustment is based on the results of a market analysis, or area wage survey, rather than some COL index. (App. 60.)

In November 1989, a general adjustment was announced at the Greenville Distribution Center for the year 1990. (App. 20, 101.) This general adjustment consisted of a 3½% change to the pay scale; the individual pay categories each received a different percentage increase. (App. 20, 101.) In 1991, some, but not all, Greenville employees with over two years of service received a 0.9% adjustment to the pay scale. (App. 101.) For example, one category of employees received a 50¢ per hour adjustment, while another category received a 15¢ per hour adjustment. The "net" increase for 1992 for all pay ranges across the scale constituted a 4.3% change to the pay scale.

Moreover, general adjustments given to employees at each of Petitioner's five facilities vary both in amount and distribution among the individual pay grades of employees. In fact, there is *no* instance of any across-the-board percent increase being given to all employees at a distribution center. Thus, the mere fact that one pay grade receives an adjustment does not mean that all other pay grades will receive the same cents-per-hour increase or the same percent increase. Petitioner now turns to events from November of 1992 through January of 1993.

In November 1992, Roberts was on a routine visit in the Greenville Distribution Center when he was *approached* by several employees who asked whether there would be an adjustment for the year 1993, and if so, what that increase would be. (App. 4, 101.) At that time *no* recommendations had been made regarding a general adjustment for 1993. However, based on the 4.3% weighted average adjustment made in 1992, Roberts responded that, "to the best of our knowledge, we expected there to be an annual increase in the range of 4% to 5%, but *that was not confirmed.*" (App. 4, 101.) (Emphasis added.)

Around the first part of December 1992, Roberts traveled to the Greenville facility to inform *all* of the

employees of the *same* information. (App. 4, 101.) Specifically, Roberts told employees "at that time our assumption was that there *might* be an annual increase in the range of four to five percent"; however, because the company was awaiting some market analysis data, no decision had been made regarding the giving of an adjustment, if any.[3] Thus, *the employees were given no guarantees that a general adjustment would be given in the year 1993*. In fact, there was no further mention to employees of any adjustment until January 22, 1993.

Roberts subsequently received the Hay Report in mid-December 1992, which revealed that Phoenix's pay scale was not competitive. (App. 4, 102.) As such, each of the distribution center managers, including Ferguson, undertook wage surveys in their respective areas. (App. 4-5, 101-02.) As late as January 6, 1993, the day before the union's petition was filed, Ferguson was gathering wage data from local competitors. *Id.* This information would be forwarded to Roberts so that he could formulate a recommendation to present to Petitioner's president for review, modification, and, ultimately, decision. *Id.*

As of January 8, 1993, no decision had been made regarding amounts for general adjustments in any of Petitioner's five facilities. However, by this time,

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[3] In the summer of 1992, Petitioner engaged the services of the Hay Group to conduct a market analysis for its Phoenix Distribution Center. (App. 4.) The Hay Group's findings would impact the pay scales in all of Petitioner's facilities because the pay progression in the five facilities was generally in "the same ball park." Thus, if the Hay Group found Phoenix's pay scale competitive, Petitioner could assume that Greenville's pay scale was also competitive. Conversely, if the Hay Group showed Phoenix's pay scale was not competitive, a market analysis would have to be conducted for each of the distribution centers to determine the appropriate adjustments for the individual facilities. (App. 4, 101-02.)

AutoZone became aware that the union had filed its petition for an election.[4] (App. 103.) Based on Roberts' cursory review of wage information sent to him by Ferguson on the afternoon of January 6, 1993, Roberts *expected* the adjustment would be greater than the 4% to 5% previously forecasted for Greenville. (App. 5, 19.)

In light of the union's demand for recognition, coupled with the fact that a decision regarding Greenville's general adjustment had not been finalized *nor disclosed to employees*, Roberts contacted and apprised legal counsel of the above considerations, including the fact that the adjustment might be larger than normal. (App. 102-03.) Based on this information, counsel advised that it would be unlawful to implement an as-of-yet undecided-upon raise. (App. 103.) Therefore, a recommendation for a general adjustment to Greenville's pay scale for 1993 was never prepared. (App. 103.)

On January 11, 1993, Petitioner's president reviewed the recommendations presented to him for the other facilities. (App. 5.) After making some modifications to Roberts' recommendations, Petitioner's president gave final approval for adjustments in the other distribution centers on the evening of January 11, 1993. (App. 5.) Significantly, the general adjustments varied greatly among the facilities, ranging from 3.3% to 10.24%. Again, not every employee received the same raise. To the contrary, each "class" of employees received a different amount. To this day, a decision regarding a general adjustment to Greenville's pay scale has not been finalized. (App. 103.)

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[4] The Petition was filed on January 7, 1993. However, at 5:29 p.m. on January 6, 1993, the union sent a telegram to Ferguson demanding recognition, a practice commonly heralding the arrival of a formal NLRB petition. (App. 103.) Upon receipt of the telegram, Ferguson immediately contacted Roberts. (App. 103.)

(3) The Court Below Erred in Concluding That Petitioner Violated the Act Where Petitioner Merely Informed Employees of the Legal Restrictions Guiding Its Decision With Regard to Wage Adjustments.

In its decision, the court below affirmed without discussion the Board's mechanical application of factors set forth in *Atlantic Forest Prod., Inc.*, 282 N.L.R.B. 855, 858 (1987), to find that Petitioner violated the Act during a presentation given to employees on January 22, 1993. (App. 65.) However, this mechanical approach was previously rejected in *Cutter Lab., Inc.*, 221 N.L.R.B. 161 (1975),[5] wherein the Board stated: "No aspect of [Petitioner's] conduct can be viewed in isolation. The totality of the circumstances must be considered to avoid a mechanistic and unrealistic application of the Act." *Cutter*, 221 N.L.R.B. at 168. This decision, *Atlantic Forest Products*, which is contrary to previous Board law and the law of the Sixth Circuit, must not be permitted to control the outcome of this case.

On January 22, 1993, Roberts addressed the employees of Greenville to explain the *legal status* of a general adjustment. All parties *stipulated* to the prepared text read to employees on that day:

> The other issues I want to discuss have to do with the status of pay increases at this DC. A number of you have asked when or if the 4% to 5% increase we mentioned back in December would be going through. *You need to understand that the numbers we mentioned in December were a tentative forecast only.* After that time we decided

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[5] In *Cutter Lab., Inc., supra*, the Board reversed a finding of 8(a)(1) liability under similar circumstances, concluding the respondent did not violate the Act by informing employees of its decision to withhold wage increases during a union campaign.

> to reevaluate the pay situation in this market. Before we were able to gather all the data we needed and reach a final decision, however, the Teamsters' Petition came in. *Our understanding of the law is that we cannot make changes in the pay scale or benefits once the Petition comes in unless the decision has been finalized beforehand. We very much regret that the union's poor timing has now tied our hands, but we do not intend to violate the law.* The thing to keep in mind, though, is that once the union is beaten in the election – and we feel confident that that is exactly what is going to happen here, then we will be able to move forward, free of the restrictions that we now live under. We are sorry we cannot be more specific than that now, but we wanted you to understand *the legal status* of your pay increase at the time.

(Emphasis added.)

The text of the speech shows that Roberts was merely informing employees of Petitioner's obligation under the Act, which is lawful. In *Great Atl. & Pac. Tea Co.*, 192 N.L.R.B. 645 (1971), the Board reversed the ALJ's finding that 8(a)(1) liability existed because the company withheld employee raises during the union campaign. In that case, like here, at the time the petition was filed, the company had not completed its wage survey. Therefore, no decision had been reached concerning a wage increase. Once the petition was filed, the company consulted its attorney, who advised the withholding of any raise. At trial the company argued that, because it could not designate any particular date or amount for a wage increase which could be definitely shown as that which would have occurred absent the campaign, it decided not to give any increase.

The Board *dismissed* the charge, finding significant the fact that employees were not promised any type of

wage increase, *notwithstanding the fact that employees were aware increases had been given in the past around this time.*[6]

The company, when asked about a raise during the campaign, told employees that it "would be an unfair labor practice charge to give a raise while the union is organizing. . . . *We intend to obey the law.*" 192 N.L.R.B. at 650. Because the company did not seek to capitalize on the absence of the wage increase, no violation was found.

Petitioner, in its speech on January 22, 1993, repeatedly referred to its legal obligations, and its intent to "obey the law." In *Honey Elec., Inc.*, 138 LRRM 1014 (1991), *aff'd in part, rev'd in part*, 964 F.2d 543 (6th Cir. 1992), the Board reversed the ALJ's finding of 8(a)(1) liability for those very reasons:

> Contrary to the Judge, we find that Respondent's *stated* reason for not announcing the [wage] plan did not shift the onus to the union. Rather, Respondent simply informed its

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[6] Herein, the Board erroneously likened the situation in *Atlantic Forest Prod., supra*, to the instant case. However, in *Atlantic Forest Prod.*, the employer withheld *regularly scheduled* pay raises given to employees *every year in January and July*. Petitioner does not maintain such an established practice, nor did Petitioner ever guarantee a wage increase to its employees. To the contrary, employees were specifically informed that a wage adjustment would be dependent upon the outcome of a market analysis not yet completed. (App. 4.) In *Rosaeurs Supermarkets, Inc.*, 300 N.L.R.B. 709 (1990), the ALJ dismissed the 8(a)(1) violation, stating: ". . . . I find that [the company] outlined the proposed new wage program and the employees interpreted this to mean, mistakenly or not, that the program would have resulted in immediate wage increases. Whether the new program would have resulted in immediate wage increases cannot be determined on this record. It is clear from all testimony, however, that no specific amount of increases were announced. Rather, only that the new wage program would be implemented January 1." 300 N.L.R.B. at 712.

> employees it would not do anything that could be interpreted as a violation of the Board's rules. Such a statement merely indicated to employees that the Respondent wanted to be sure that it acted in a lawful manner and did not attribute the decision to the union or the union campaign.

138 LRRM at 1016. (Emphasis added.)[7]

Herein, instead of viewing the speech in its entirety, and according weight to the written words, the Board selectively focused on disjointed phrases contained in the speech to sustain the violation. (App. 19-20, 65.) Interpreting these statements out of context, the Board concluded, "The subliminal message is that a 'yes' vote will doom any pay adjustment." (App. 65.)

Petitioner excepts to the Board's selective and disjointed interpretation of the campaign text and the lower court's deference to the Board on this issue. "In assaying the legality of words spoken or written in connection with a union campaign, the language should neither be isolated nor analyzed in a vacuum, but must be considered in light of the surrounding circumstances in which it was written." *NLRB v. Big Three Indus. Gas & Equip. Co.*, 441 F.2d 774, 777 (5th Cir. 1971). Herein, while Petitioner expressed its hopes of winning the election, it did *not* tell employees that adjustments would not be given if the union were selected as their collective bargaining representative. Rather, the speech fairly and correctly interpreted the law applicable to the situation. The speech, when viewed in its entirety, does not constitute a violation of Section 8(a)(1) of the Act.

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[7] See also *NLRB v. Service Garage, Inc.*, discussed *infra*, and *Bowling Green-Warren County Community Hosp. Corp. v. NLRB*, *infra*.

(4) The Court's Imposition of 8(a)(3) Liability Was Clearly Unwarranted Because Petitioner Had No Established Past Practice of Granting Wage Adjustments.

In its decision, the court below focused on what it perceived as Roberts' unlawful motives (App. 19-20, 108-09), rather than on objective evidence regarding Petitioner's past practice, or lack thereof, in granting wage adjustments, to conclude that Petitioner violated Section 8(a)(3). (App. 19-20, 159.) In so doing, the court below completely disregarded the perils faced by employers such as Petitioner in granting or withholding benefits during a union campaign.[8] Because the decision below is based solely upon the subjective belief that Petitioner did not finalize an amount of any adjustment due to anti-union animus, it must be reversed. Consideration of objective factors guiding Petitioner's decision to withhold wage increases shows that liability was wrongly imposed.

Relying on *Otis Hosp.*, 222 N.L.R.B. 402 (1976), *aff'd*, 545 F.2d 252 (1st Cir. 1976), the Board erroneously concluded that: "AutoZone artificially interrupted its processing of the wage adjustment process for its Greenville, South Carolina Distribution Center, while continuing with it for its other distribution centers because on January 7, 1993, the Union filed a representation petition in Case 11-RC-5844." (App. 159.) The Board's reliance on *Otis Hosp.* is misplaced. In that case, the Board found that the employer violated Sections 8(a)(1) and 8(a)(3) of the Act by withholding a *regularly scheduled wage increase.* The

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[8] This dilemma was best summarized by the court in *J.J. Newberry Co. v. NLRB*, 645 F.2d 148 (2d Cir. 1981): "Having previously decided to increase wages, the employer in August 1977 was in a position of being forced to tread on eggshells, being caught in a potential 'damned if you do, damned if you don't' situation." 645 F.2d at 151.

Board's decision was premised upon several aggravating factors not present in the instant case.

Unlike Petitioner, the employer in *Otis Hosp.* maintained an established practice of granting wage increases. The wage increase was nevertheless withheld in the face of a union campaign, despite encouragement from the union to implement the raise. The employer further instructed an employee to tell all other unit employees that no raise would be given because of the union. Finally, there was no testimony that the employer withheld raises because of its concern over the filing of unfair labor practice charges. As such, the violations were sustained.

Also unlike the employer in *Otis Hosp.*, Petitioner did not have the benefit of union approval regarding implementation of an increase.[9] Additionally, Petitioner did not, as the employer did in *Otis Hosp.*, instruct an

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[9] In its decision, the Board noted: "By letter dated January 19, the union encouraged AutoZone to give employees pay raises 'currently due' to some employees, and warned that charges would be filed for numerous violations of the Act. AutoZone did not formally respond to the Union's letter." (App. 43.) The letter referred to by the Board lacks significance for two reasons: (1) the raises referred to therein concern the normal progression raises which were given to employees during the campaign; and (2) the union's "promise" would not prevent the filing of unfair labor practice charges by someone other than the union. Moreover, Dave Barry, an international organizer for the Teamsters, testified that he allegedly spoke to Ferguson subsequent to sending this letter. During this conversation, Ferguson did *not* state that a final decision had been made regarding a general adjustment for Greenville employees. Additionally, Petitioner did "respond" to this letter in the sense that employees were given their normal progression raises thereafter. Finally, the letter confirmed Petitioner's concern over the filing of unfair labor practice charges because the union expressly stated that it intended to file charges for "numerous violations of the Act." (App. 43.)

employee to "spread the word" that a raise was being withheld "because of the union." Finally, the unrebutted testimony of Roberts established that Petitioner proceeded cautiously, after consultation with legal counsel, and in an effort to avoid unlawfully interfering with the outcome of the election. (App. 102-03.) Under these circumstances, Petitioner's actions did not violate the Act.

According to the law of the Sixth Circuit, because the Board places on employers the burden of proving that wage increases granted during an organizing campaign are not motivated by a desire to influence the campaign, a reviewing court must examine the evidence closely where the charge is that failure to grant a wage increase during a campaign is an unfair labor practice. *NLRB v. Service Garage, Inc.*, 668 F.2d 247, 249 (6th Cir. 1982).

The undisputed evidence presented at trial clearly demonstrates that the company was in the process of determining general adjustments when the petition was filed. (App. 102-04.) In fact, Ferguson was gathering competitive wage data on January 6, 1993, the day before the petition was filed. (App. 102-03.) Absent a final determination on the amount of a general adjustment prior to the union's petition, Petitioner could not lawfully proceed with an increase.

Nevertheless, the Board found and the court below agreed that "AutoZone has failed to show that it would have postponed its analysis notwithstanding the fact of union activities and solely over the concern that to proceed in the face of an election petition, when no pay raise decision had been finalized, would have been unlawful." (App. 107.) This *per se* approach was rejected in *J.J. Newberry Co. v. NLRB*, 645 F.2d 148 (2d Cir. 1981), where the court noted:

> 20-20 hindsight supports the view that because the employer's decision to increase wages was made prior to and independently of any union

> activity, it could have gone ahead and implemented the increase in the face of the union drive. But if the employer did so, it faced the serious risk, as its attorneys recognized, that an increase in wages so soon after the union petitioned for an election would lead to an unfair labor practice charge.

645 F.2d at 152.

In reversing the Board's finding of 8(a)(1) and 8(a)(3) liability, the court took into consideration the "employer's inability to predict with any degree of certainty whether an implementation in August of its previously adopted raise would be viewed by the Board as lawful. . . . " *Id.* This very "inability to predict" how the Board would view Petitioner's actions if it moved forward with an increase in the absence of an established practice regarding adjustments, coupled with the facts that an amount was not finalized before the petition was filed and counsel advised against implementation, guided Petitioner's decision to refrain from completing the work necessary to make a wage adjustment. The hindsight approach utilized by the Board and the court below unfairly penalizes employers like Petitioner who attempt to comply with the Act, by leaving them in an indefensible or "damned if you do, damned if you don't" position.[10]

In *Free-Flow Packaging Corp. v. NLRB*, 566 F.2d 1124 (9th Cir. 1978), the employer withheld wage increases during a union campaign based on its perception that it lacked a discernible program for granting adjustments. In

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[10] In *Plasticraft, Inc. v. NLRB*, 586 F.2d 185, 188 (10th Cir. 1978), the court stated: "That an ALJ with the benefit of hindsight and complete data might later 'find' that there was a status quo would be irrelevant. The focus is whether the status quo would have been clearly apparent to an objectively reasonable employer *at the time*." (Emphasis added.)

the past, the employer, like here, had granted increases, but these increases were sporadic in nature and were never given across the board, but instead varied among individual classifications of employees. When the union petition was filed, the company contacted legal counsel who advised against giving the raise. The company relied on counsel's advice and in turn informed employees that no raise would be given because it would constitute an unfair labor practice.

The ALJ sustained the violation based upon the employees' "reasonable expectation of an increase." 566 F.2d at 1130. In reversing the ALJ's decision, the court initially noted that "it is not always clear to an employer whether a wage increase would conform to the status quo or depart from it." 566 F.2d at 1129. The court went on to state:

> The employer's dilemma, then, persists, save when the status quo – the state of existing conditions of employment with respect to wage increases – is clearly apparent and it can with assurance be said that grant or denial of a wage increase would constitute a change from those conditions. In a case where status quo is not clearly apparent, and accordingly the employer's dilemma persists, no inference of antiunion motive can be said to flow from an after-the-fact determination of what the status quo in fact was. There is no rational basis for such an inference unless the status quo is clearly apparent and it can be reasoned that the employer willfully chose to depart from it.

566 F.2d at 1129.

Based upon the employer's past practice with regard to wage adjustments, the court held that "the status quo was not so clearly apparent as to dissipate the employer's dilemma. . . . and give rise to an inference of antiunion motive." *Id.* at 1130. In the instant case, Petitioner's past

practice with regard to wage adjustments falls squarely within the dilemma described in *Free-Flow Packaging*. The court's subjective belief that Petitioner's actions were unlawfully motivated is unsupportable.

The courts have consistently recognized an employer's predicament in situations where wage adjustments are not automatic but rather contain elements of discretion and uncertainty. Thus, the inference of unlawful motive is not to be lightly drawn, and it must be based upon substantial evidence in the record and not on conjecture. *Stokely-Van Camp, Inc. v. NLRB*, 722 F.2d 1324, 1329 (7th Cir. 1983). Herein, inferences drawn by the court below and the Board are *not* supported by substantial evidence. Instead of according weight to evidence presented with regard to the sporadic nature of wage adjustments, Petitioner's reliance on advice of counsel (App. 103), and its stated concern to comply with the Act (*Id.*), the Board focused on what it perceived to be Roberts' lack of credibility as a witness and the court below adopted the Board's perceptions. (App. 105-06.)

According to the Board, "to the extent it is necessary, [we] do not credit Vice President Roberts." (*Id.*) The Board erroneously formed this "opinion" by pointing to alleged "inconsistencies" between the testimony of Roberts and a lower-level supervisor. (*Id.*) Specifically, Roberts testified that he was involved in TIPS[11] training in Greenville after the Petition was filed in January 1993. (Tr. 861-862.) The Board then compared this testimony to that of supervisor Schlicting, who stated that *Ferguson* began the TIPS instructions in late December 1992. From this, the Board concluded that Roberts must have known that the TIPS training was occurring in December 1992. (App. 104.) Certainly, the Board's conclusion is strained

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[11] During the campaign, supervisors were instructed not to *threaten, interrogate, promise,* or *surveil* employees. (App. 104.)

at best. Just as plausible a conclusion is that there were two sessions, one during the pre-petition period and the second, more comprehensive session after the petition was filed when conduct was now within the "critical" period, post-petition and pre-election.

Additionally, the Board relied on a one-line answer given by Roberts during a lengthy question-and-answer session held on January 22, 1993, where Roberts was bombarded with questions by employees pertaining to the union campaign. Specifically, in response to a question regarding wage adjustments given in the different facilities, Roberts stated that the pay increases averaged anywhere from 12% to 15%. While the Board conceded that this answer was correct with respect to pay increases given at the Phoenix Distribution Center (App. 104), it took exception to Roberts' "failure" to explain the "weighted" increases given in each of the other four facilities.[12] The court below agreed with the Board.

In *hindsight, perhaps* Roberts could have more fully explained the different percentages assigned to each class of employees at each of the distribution centers; however, to discredit this testimony, while conceding that it was correct, is unsupportable. Moreover, during the question-and-answer session, Roberts reiterated that Petitioner intended to obey the law, and further, that it would not imply promises because that would "violate the law."

In *Peabody Coal Co. v. NLRB*, 725 F.2d 357 (6th Cir. 1984), the Court of Appeals stated that 8(a)(3) discrimination in the context of wages violates the law *only* if it stems from improper motives. 725 F.2d at 367. That court

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[12] Formulation of a "weighted increase" involves multiplying the number of employees in each classification by the percentage adjustment given in that class. This number is then divided by the total number of employees at the facility to yield a weighted increase. (App. 106.)

went on to explain, "When an employer can demonstrate some other lawful rationale for such disparate treatment, such as a substantial and legitimate business purpose, *or even a desire to avoid the risk of an additional 8(a)(3) charge,* it has not engaged in forbidden conduct." *Id.* (Emphasis added.)[13] The unrebutted testimony and documentary evidence show that Petitioner acted lawfully, by refraining from making a decision as to the amount of a wage adjustment, after consultation with counsel and in an effort to comply with the Act.

In *Bowling Green-Warren County Community Hosp. Corp. v. NLRB*, 756 F.2d 41 (6th Cir. 1981), the employer commissioned a wage survey in early 1981 to ascertain whether a wage adjustment was necessary. The union filed a petition for representation in March of that year. Immediately thereafter, the employer contacted legal counsel to determine whether the proposed wage review could be implemented. Because employees had been informed of the wage study, but no firm date or dollar amount of the adjustment had been finalized, legal counsel advised against giving the raise to unit employees.

Relying on counsel's advice, the employer withheld unit employee increases while granting increases to non-unit employees. Following the election, which the union won, the company offered to implement a wage increase if the union did not object. The union agreed, but demanded that the employer grant the raise retroactively to the date non-unit employees received raises. The employer refused, so the union filed charges contending that the company unlawfully withheld wage adjustments during the campaign.

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[13] *See also NLRB v. Cleveland Trust Co.*, 214 F.2d 95 (6th Cir. 1954) (holding the Board is not authorized to ignore material, uncontradicted facts).

The Board concluded that the wage increase had not been made definite in time or in amount. Thus, because the raise did not constitute a "scheduled increase," its withholding was not violative of the Act. However, the Board found that the employer's action in granting increases to non-unit employees, while withholding increases from unit employees, violated the Act, "evidencing a discriminatory motive on the part of the employer." 756 F.2d at 43.[14]

The Sixth Circuit *reversed* the Board's finding that the employer unlawfully withheld wage adjustments to unit employees while granting increases to non-unit employees, noting that the employer was in a precarious position when it announced the wage study which was subsequently followed by the union's petition:

> Thus, Medical Center was truly confronted with a dilemma; it was likely to be damned whether or not it granted an increase to the [unit] as of April 1. . . . Similarly, it is not so clear that had Medical Center attempted to explain the reason for the less than uniform increase it would have escaped Board action. . . . We therefore are not persuaded by the Board's hindsight in this case. The choice made by Medical Center appears to have been a logical one. . . .

756 F.2d at 43-44.

A similar conclusion was reached by the same circuit in *NLRB v. Service Garage, Inc.*, 668 F.2d 247 (6th Cir. 1982), where the employer withheld a wage adjustment during a union campaign. There, the ALJ found the employer maintained no discernible practice of granting wage adjustments, despite employee rumors that a 7% COL

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[14] The Board speculated that the petitioner could have complied with the Act by either (1) withholding the increase in its entirety; or (2) explaining to unit employees the reason an increase was being withheld. 756 F.2d at 44.

adjustment was expected in January. When asked about a raise, however, the company stated that it was being withheld because of the union. Citing the ALJ, who concluded that the employer did not violate Section 8(a)(1) or (3), the court wrote:

> Under Board policy, there is a presumption that the purpose of a wage increase granted during a union campaign is to interfere with the campaign and the employer bears the burden of rebutting this presumption, perhaps by showing the increase was consistent with past practice.

668 F.2d at 248.

Consideration of the employer's past practice with regard to wage adjustments led to the ALJ's conclusion that, had the employer granted the 7% adjustment, it could not have rebutted this presumption. The Board reversed the ALJ based solely upon the supervisor's statement, which placed the onus on the union for the withheld wage adjustment. According to the Board, the supervisor's statement made the company's past practice with respect to wage increases "immaterial." 668 F.2d at 249. Reversing the Board's decision, the Court of Appeals noted: "It [the Board] concluded somewhat simplistically that the company did not face the dilemma outlined by the ALJ because it was only required to act as if there was no union." *Id.* at 249. The Court of Appeals denied enforcement of the Board's make-whole remedy, stating:

> Since the Board has placed on employers the burden of proving that wage increases granted during an organizing campaign are not motivated by a desire to influence the campaign, we must review the evidence closely where the charge is that failure to grant a wage increase during a campaign is an unfair labor practice.

Id. at 249.

Another analogous case is *NLRB v. Planter's Peanuts*, 574 F.2d 400 (8th Cir. 1978), where the court denied

enforcement of the Board's order. In *Planter's*, the employer computed wage increases by conducting yearly local wage surveys. *Id.* at 402. The wage survey for the following year's increase was complete and increases were being considered when the union filed its petition. *Id.* at 403. However, *no final decision to implement an increase had been made. Id.* at 404. The court, recognizing the employer's precarious position, held that the employer did not violate the Act by not moving forward with a wage increase. *Id.* at 406.

Considering the foregoing, the court below was clearly wrong in finding that Petitioner violated the Act. Had Petitioner moved forward with a wage adjustment, which was historically sporadic in nature and undetermined at the inception of the union campaign drive, Petitioner would, in all likelihood, be defending against unfair labor practice charges, including a bargaining order, for *granting* an increase. Board precedent has repeatedly failed to recognize the precarious position faced by employers like Petitioner. Under the circumstances, Petitioner cannot be unfairly penalized for its good-faith efforts to comply with the Act.

B. The Court Below Improperly Disregarded the Written Text of a Campaign Speech to Find That Petitioner's Noncoercive Expressions of Opinion on Union Matters Violated the Act.

The court below determined that Petitioner unlawfully threatened employees with closure of the Greenville facility based *not* upon the words contained in a written text delivered *verbatim* to employees, but upon unfounded assumptions and mere speculation. The prepared speech was *stipulated into evidence* by *all parties* and states in pertinent part:

> I know, as sure as I am standing here, that if I let anyone – here or anywhere else in this company – think the Teamsters' union is in charge, I

> might as well close the doors, put a lock on the gate and throw away the key. I will not let the Teamsters, with their record and their own agenda, destroy what you and I have built.

Significantly, the Board correctly pointed out in its decision that the speaker did *not* state he would close the doors if the union was voted in. Inexplicably, however, the Board sustained the violation based upon its *subjective* belief that the words contained in the speech "implied" closure of the facility and the court below agreed with this subjective belief. (App. 17.) According to the Board:

> His message is that if the union gets in, and secures such favorable contract terms (to which, of course AutoZone would have to agree), so that someone at AutoZone could *'think'* that *if* the union was in charge, then [the speaker] *'might as well'* close the Greenville plant. And he would do so because 'I will not let the Teamsters, with their record and their own agenda, destroy what you and I have built.' That, I find is the message.

(App. 86.) (Emphasis added.) The court below agreed with this conclusion. (App. 17.)

Petitioner submits that the court's disregard of the written text constitutes reversible error. The interpretation of a written instrument is a question of law to be decided by the courts. *Florida Steel Corp. v. NLRB*, 587 F.2d 735, 751 (5th Cir. 1979). Accordingly, "the interpretation and construction of such an instrument by an administrative agency, such as the Board in this case, is not binding on the court." *Id.*

The Court of Appeals for the Sixth Circuit previously rejected the Board's interpretation of a campaign speech in *NLRB v. Pentre Elec., Inc.*, 998 F.2d 363 (6th Cir. 1993). In that case, the company's vice president told employees, "we would not have the jobs we have now if we had been union, and it would have been very difficult to get work

if we were union." 998 F.2d at 367. The Board found this language violated the Act, reasoning that the "effect of those statements was to convey to employees that unionization would result in the company's closing its doors." *Id.* at 368.

On appeal, the Sixth Circuit rejected the Board's approach, noting that "the right to free speech in a union organizational campaign is not to be narrowly restricted." *Id.* at 368. Thus, the Board's decision was vacated because its conclusions were not supported by substantial evidence.

Herein, the speech falls squarely within the purview of Section 8(c) of the Act.[15] When the allegedly unlawful statement is viewed in the context of the entire speech, it is evident that it was only intimating the fact that Petitioner had no intentions of allowing the union to control its policies by forcing unreasonable demands upon the company.

In *Emory Convalescent Home*, 260 N.L.R.B. 540 (1992), the Board correctly held that the mere reference to closure of a nursing home in a company speech discouraging unionization did not constitute unlawful employer conduct. In that case, the employer's representative stated, "We do not want to see this convalescent home forced to close." *Id.* at 554. The Board held that this was not a direct threat of closure and therefore protected campaign speech under Section 8(c) of the Act. *Id.*

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[15] 29 U.S.C. § 158(c) states "The expressing of any views, argument or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit."

A fortiori, the speech, which in no way threatened or coerced employees by linking the unionization of Petitioner's employees with the closure of the Greenville Distribution Center, is also lawful under the Act.

C. Employees Were Informed of Striker Reinstatement Rights; Therefore, the Court Below Was Clearly Wrong in Concluding That Petitioner's References to Strikes Constituted a Violation of the Act.

The court below improperly focused on another part of the referenced speech to find that Petitioner unlawfully threatened employees with loss of their jobs. Specifically, it was stated:

> Nobody wins a strike. In each of the cases I mentioned, both the company and the Teamsters survived the strike and are still around. Nashville is still operating full bore. So is Sikeston and so is Memphis. The only part of the equation not still there are the employees who allowed the Teamsters to call them out on strike. As Rick and Dennis told you, the 185 strikers at our Nashville warehouse who walked out on an illegal wildcat strike were all fired. Those 185 employees did not get to vote. Not one of them has ever gotten his job back. The strikers in Memphis and Sikeston were all replaced, and none of them have gotten their jobs back to this day. In fact, there is no union today in the Nashville DC, the Sikeston DC, or the Memphis DC.

Significantly, in sustaining the violation, the court below and the Board relied *not* on statements made in the speech, but rather on Petitioner's alleged "omissions." Specifically, the Board correctly noted that "the statement about fired illegal strikers never getting their jobs back is *lawful*." (App. 84.) (Emphasis added.) According to the

court below and the Board, however, because Petitioner allegedly failed to explain "that the names of the replaced employees could be placed on a preferential hiring list and that they would be recalled if a permanent replacement left the employ of the Respondent," the references to strikes were unlawful. (App. 16, 83.) Petitioner *did* inform employees of striker reinstatement rights; thus the Board's erroneous conclusion must be reversed.

During the preelection period, meetings were held with groups of employees for the presentation of speeches by members of management as a means to communicate facts and opinions about the union. In the group talks given the week of January 25, 1993, *all* warehouse employees were informed of striker reinstatement rights:

> Our only obligation, if the strikers give up the strike and offer to come back to work, is to place them on a preferential hiring list and to bring them back to work when positions become available, which may be never.

Therefore, the Board's reliance on Petitioner's alleged "omission" was wrong, and its finding of a violation must be reversed.

Moreover, it is well established that an employer may tell its employees about the union's history of strikes and discontent. *PPG Indus.*, 247 N.L.R.B. 941 (1980). Similarly, truthful disparagement of a union's "track record" in reference to possible "delays, dues and strikes" are protected statements. *Gossen Co.*, 254 N.L.R.B. 339 (1981), *modified on other grounds*, 719 F.2d 1354 (7th Cir. 1983). Herein, the company merely communicated the Teamsters' "track record" of strikes with which the speaker was involved, which is lawful. *Florida Steel Corp. v. NLRB*, 587 F.2d 735, 751 (5th Cir. 1979). Additionally, no threat of job loss occurred because employees were previously informed of striker reinstatement rights.

CONCLUSION

To the extent the decision of the Court of Appeals for the Sixth Circuit found that Petitioner engaged in unfair labor practices or objectionable conduct, Petitioner respectfully requests it be reversed. Not only are the court's findings unsupported by substantial evidence, they are contrary to Board precedent, the law of the Sixth Circuit and other circuits.

Respectfully submitted this 19th day of July, 1996,

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NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Nos. 94-6280, 94-6408

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AUTOZONE, INC., Petitioner Cross-Respondent, v. NATIONAL LABOR RELATIONS BOARD, Respondent Cross-Petitioner.	)	ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD
		(Filed April 24, 1996)

BEFORE: NELSON and SILER, Circuit Judges; and WISEMAN, District Judge.*

PER CURIAM. This case comes before this Court on petition of AutoZone, Inc. ("AutoZone") for review of a decision and an order rendered on September 30, 1994 by the National Labor Relations Board (the "Board"). On cross-application, the Board seeks enforcement of the order. We **DENY** AutoZone's petition to set aside the decision of the Board. Furthermore, we **GRANT** in full the Board's cross-application for enforcement of its order.

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* The Honorable Thomas A. Wiseman, Jr., District Judge for the Middle District of Tennessee, sitting by designation.

I. Facts and Procedural History

A. General Background

AutoZone is engaged in the distribution and sale of automotive parts throughout the continental United States. Among its nationwide distribution centers is a facility located in Greenville, South Carolina. The events of this case arose during an effort by the General Drivers, Warehousemen and Helpers, Local No. 28, International Brotherhood of Teamsters, AFL-CIO (the "Union") to seek representation of employees at this facility in Greenville.

In October or November of 1992, the Union began an organizing campaign among the employees at the Greenville distribution center. By January 6, 1993, the campaign culminated to the point of recognition demand, and on the following day, January 7, the Union filed a representation petition with the Board. By a letter dated January 8, Greenville Distribution Center Manager Rick Ferguson declined the Union's demand for recognition. On January 11, Ferguson posted a notice to all personnel, advising them of the Union's petition and of AutoZone's opposition. On January 27, the Board's Regional Director approved a stipulation by both AutoZone and the Union that a representation election be held on March 5, 1993 among employees in an agreed-upon bargaining unit.

The Union lost the election. Of approximately 203 eligible voters, 57 voted in favor of union representation and 135 voted against, with two challenged ballots. Thereafter, the Union filed objections to AutoZone's conduct, allegedly affecting the election results. Certain of

these objections were subsequently consolidated for hearing with a complaint issued by the Board's Regional Director alleging unfair labor practices against AutoZone.

B. AutoZone's removal of Union Flyers

AutoZone's unlawful conduct first surfaced on January 20, when Supervisor Timothy Schlichting, in the presence of Supervisor Eddie Massey and Personnel Manager Jim Wartinger, removed three or four letter-sized union flyers from a bulletin board, used by employees for sales notices and other personal notes, in the Company canteen. Schlichting, however, did not remove the antiunion materials also posted on the board. Having observed Schlichting's removal of the flyers, employee Reuben Rice complaint to Vice President Dennis Roberts about the removal shortly after Schlichting's actions; the flyers were reposted later that day.

C. AutoZone's Pay Adjustment Process and Surrounding Conduct

AutoZone uses a pay increase procedure that includes an annual pay "adjustment" for the employees at its various distribution centers, each having its own wage scale. The annual increase is determined separately for each distribution center by its local management and is not guaranteed. In fact, the increase is granted only if a wage survey shows a given distribution center's payscale is not competitive within its geographic area. Once the information is collected, Vice President Roberts reviews it

and then makes a recommendation to AutoZone's president. In 1991, AutoZone began conducting its wage surveys and analysis in December, with wage adjustments being made in January 1993.

On a routine visit in November 1992 to the Greenville Distribution Center, Roberts was approached by several employees, asking about a wage increase and if so how much. Roberts replied to the best of his knowledge that he expected a wage increase between 4 to 5 percent, but this figure was not yet confirmed. About two weeks later, Roberts returned to Greenville, where both he and management met with small groups of employees to convey the same information about the wage increase. In addition, they added that AutoZone was awaiting the results of a labor market analysis being done in its Phoenix, Arizona distribution center by the Hay Group. If the Phoenix survey showed AutoZone's wages not to be competitive there, AutoZone would then assume its other distribution centers were also not competitive and initiate wage surveys in those areas.

In mid-December 1992, Vice President Roberts received a copy of the Hay Group survey, which indicated that AutoZone's pay was no longer competitive in the Phoenix area. In response, Roberts issued instructions to begin wage surveys for all distribution center areas, including Greenville. Having received all the data for AutoZone's distribution centers, Roberts reviewed the material and passed on his wage increase recommendations for all the distribution centers, except for Greenville. Roberts placed the Greenville wage data aside; he

did not perform his analysis or finalize a recommendation regarding a pay adjustment for the Greenville Distribution Center. On January 11, 1992, AutoZone's president approved Roberts' recommendations with some modification.

According to the data from the wage surveys at the other distribution centers, the wage adjustment at Greenville, had it been made, would have been greater than 5 percent. Furthermore, if the adjustment had been implemented at Greenville, it would have been effective for the pay period beginning January 3, 1993.

On January 22, 1993, Vice President Dennis Roberts and Manager Rick Ferguson made a joint speech to the Greenville employees. After a few introductory comments, Ferguson emphasized that "We do not want the teamsters or any other union in our operation!!". He added, "We are completely and entirely against this union getting in here and we will take every legal step available to keep it out !!". Roberts, delivering the second half of the speech, stated:

> The other issue I want to discuss has to do with the status of pay increases at this [distribution center]. A number of you have asked when or if the 4 to 5 percent increase we had mentioned back in December would be going through. You need to understand that the numbers we mentioned in December were a tentative forecast only. After that time, we decided to re-evaluate the pay situation in this market. Before we were able to gather all the data we needed and reach a final decision, however, the Teamsters' petition came in. Our understanding of the law is that we cannot

> make changes in the pay or benefits once a petition comes in, unless the decision had been finalized beforehand. We very much regret that the union's poor timing has now tied our hands, but we do not intend to violate the law. The thing to keep in mind, though, is that once the union is beaten in the election – and we feel confident that is exactly what is going to happen here – then we will be able to move forward, free of the restrictions that we now live under. We're sorry we cannot be more specific than that now, but we wanted you to understand the legal status of your pay increase at this time.

AutoZone then conducted a question-and-answer session following this speech. In response to a question concerning pay increases at the other distribution centers, Ferguson responded that the average increase was between 12 and 15 percent.

D. AutoZone's Gag Order

On February 11, 1993, several members of the Union's organizing committee approached Ferguson and Roberts to discuss a problem concerning, in essence, discriminatory practice by AutoZone. Reuben Rice, an AutoZone employee, read to them a short handwritten note protesting a company practice of allowing antiunion employees to walk around the facility during work time making antiunion statements to other employees, while prohibiting union supporters from campaigning for the Union during work time. Two days before this meeting, Supervisor Schlichting told employee Stanley Wilson that he would be discharged if he were caught discussing the Union on the job.

Later that day, AutoZone assembled all employees, and Ferguson told them there would be no talking whatsoever either for or against the Union during work time. He further stated that such discussion was hampering production and that violators would be subject to discipline, including discharge. This restriction was not in effect during their personal time at breaks, lunch, and before or after work; employees could discuss any topic during these times. Despite these warnings, AutoZone's policy concerning employee conversation remained in effect. That is, employees were permitted to carry on conversations during work as long as it did not interfere with their work.

In mid-February, Supervisor Barbara Cunningham told employees during a meeting that any discussion regarding the Union would lead to their being terminated.

Around the same time, Supervisor Marshall Hurley told employees, including employee Robin Delk, who were talking in the rest room line that they should not be talking about the Union.

On another occasion in mid-February, housekeeping employee James Andrews, while cleaning lavatories in the women's rest room, stopped two female employees coming in to use the facility. Andrews spoke with the two about Union health benefits, which was an issue in the campaign. As a result of the discussion, the women were delayed from returning to their jobs. Later that day, Supervisor Timothy Schlichting told Andrews that he was not to discuss union issues on company time. Schlichting never spoke with the two female employees involved,

and he did not issue Andrews a written warning or make a written note of the incident.

E. AutoZone Chairman and C.E.O. J.R. Hyde's Speech

On February 19, 1993, about two weeks before the election, AutoZone Chairman and C.E.O. J.R. Hyde made a speech to the Greenville Distribution Center employees. In his speech, he emphasized that the election was "serious business" and that AutoZone was "totally opposed to the Teamsters getting in here." Hyde further stated that although AutoZone was completely non-union, he had a long history of dealing with the Teamsters. In fact, he stated "in every instance where the Teamsters have made us lock horns with them, it has been the employees who have suffered most." He stated that the employees had "good sense" if the Teamsters strike record scared them. He described strikes he allegedly experienced at three other AutoZone distribution centers, stating with emphasis that the Union strikes "100 percent of the time." Hyde added that "[c]onsidering the record, [he] would be awfully concerned about what's going to happen [at Greenville] after March 5th [, the election date,] if the [Union were to] win." In a reference to alleged strikes at the three other facilities, he stated, "I do not want any of you or any of us to run the risk of [the Union] making this [distribution center] number 4 on their strike list against us."

Hyde continued:

> Nobody wins a strike. At each of the cases I mentioned, both the company and [the Union]

> survived the strike and are still around. [The Distribution Center at] Nashville is still operating today full bore. So is Sikeston and so is Memphis. The only part of the equation not still there are the employees who allowed the Teamsters to call them out on strike. As Rick and Dennis told you, the 185 strikers at our Nashville warehouse who walked out on an illegal wildcat strike were all fired. Those 185 employees did not get to vote. Not one of them has ever gotten his job back. The strikers in Memphis and Sikeston were all replaced, and none of them have gotten their jobs back to this day. In fact, there is no union today in the Nashville [distribution center], the Sikeston [distribution center], or the Memphis [distribution center]."

In addition, describing his attitude toward the Union, collective bargaining, and strikes, Hyde stated:

> [The Union's] record with me and your management team is just about as bad as you can get. Maybe it's because I take a no-nonsense business approach to dealing with them, and I never suck up to them or try to become pals with [the Union] bosses. I've always dealt fairly and legally with them, but neither do I quake and shake when the word "union" is mentioned.
>
> I don't make many bets but I will bet you this – [union representatives] Mr. Barry, Mr. Wood and Local 28 have never dealt with anyone like us. If [the Union] want[s] to play hardball, we can do the same.
>
> Don't misunderstand: AutoZone and I don't want a strike; we don't want trouble. But, if [the Union] make[s] demands on us which I am

> unwilling to accept, I will say, "NO." I guarantee you and Mr. Barry that if I say, "NO," I will mean it and I am ready. If you or he believe for one second that a picket line or a strike at this [distribution center] will make me give one inch – you're dead wrong. And if the organizers think a strike or picket, anywhere else – including the stores – will make me give one inch – then they are dead wrong.
>
> I know, as sure as I'm standing here, that if I let anyone – here or anywhere else in this company – think [the Union] is in charge, I might as well close the doors, put a lock on the gate, and throw away the key. I will not let [the Union], with [its] record and [its] own agenda, destroy what you and I have built.

F. The Act and the Board's Conclusions and Order

Under section 7 of the National Labor Relations Act (the "Act"), 29 U.S.C. § 157, employees "have the right to self-organization, to form, join, or assist labor organizations . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . . " According to section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." In addition, section 8(a)(3) of the Act, 29 U.S.C. § 158(a)(3), provides that discrimination in regard to . . . any term or condition of employment to encourage or discourage membership in any labor organization" is an unfair labor practice for an employer.

Based upon the foregoing, the Board, in agreement with the administrative law judge ("ALJ"), found that AutoZone violated section 8(a)(1) of the Act by removing prounion literature from a plant bulletin board while leaving antiunion literature posted; telling employees that a pay raise was being withheld because the Union had filed a representation petition; imposing a gag order on all working-time talk about unions; and threatening employees with loss of jobs and closure of its facility if they chose union representation. In addition, the Board found in agreement with the ALJ, that AutoZone violated sections 8(a)(1) and (3) of the Act by suspending its pay increase determination process and withholding a scheduled pay increase because of its employee's support for the Union.

In order to remedy these unfair labor practices, the Board ordered AutoZone to cease and desist from the violations and from any similar actions interfering with employees exercising their rights under section 7 of the Act. In addition, the Board's order requires AutoZone to complete the Greenville Distribution Center's wage adjustment process, which was unlawfully suspended in January 1993, to implement the resulting pay increase with interest, effective January 3, 1993; and to post copies of remedial notice.

II. Discussion

This Court's standard of review over Board findings is well established. The Board's findings must be sustained as long as they are supported by substantial evidence, even if the reviewing court might have justifiably

reached a different conclusion had the matter been before it de novo. 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 493, (1951); *Indiana Cal-Pro, Inc. v. NLRB*, 863 F.2d 1292, 1297 (6th Cir. 1988). In addition, the Board's application of the law to particular facts arises under the substantial evidence standard. *Turnbull Cone Baking Co. v. NLRB*, 778 F.2d 292, 295 (6th Cir. 1985), *cert. denied*, 476 U.S. 1159 (1986). We review the Board's conclusions of law de novo. *Wilson v. NLRB*, 920 F.2d 1282, 1285 (6th Cir. 1990), *cert. denied*, ___ U.S. ___, 112 S.Ct. 3025 (1992). Having reviewed the record, we believe that all of the Board's findings of fact are supported by substantial evidence and that there are no errors of law in its decision.

A. Removal of Union Material

Although the Act does not create a right of access to employer bulletin boards, *Container Corp. of America*, 244 NLRB 318 n.2 (1979), *enf'd in part*, 649 F.2d 1213 (6th Cir. 1981), once an employer "by policy or practice, . . . permits employee access to its bulletin boards for any purpose, section 7 of the Act . . . secures the employees' right to post union" or other organizational materials. *Union Carbide Corp. v. NLRB*, 714 F.2d 657, 660-61 (6th Cir. 1983). *Accord NLRB v. Challenge-Cook Bros. of Ohio, Inc.*, 374 F.2d 147, 153 (6th Cir. 1967). Accordingly, an employer's discriminatory removal of union notices from the bulletin board violates section 8(a)(1) of the Act. *Union Carbide Corp. v. NLRB*, 714 F.2d at 661; *Challenge-Cook Bros. of Ohio, Inc.*, 374 F.2d at 153.

In the instant case, it is undisputed that Supervisor Schlichting removed several union fliers from a company bulletin board while leaving antiunion material undisturbed. Despite this fact, AutoZone asserts that by reposting the material with an apology within three hours effectively cured any unlawful infringement of employees' section 7 rights.

The Board's standard for effective repudiation is set forth in *Passavant Memorial Hospital*, 237 NLRB 138 (1978). For a repudiation to be effective, it must be timely, unambiguous, specific in nature to the coercive conduct, and free from other proscribed illegal conduct. In addition, adequate publication of the repudiation to the employees is required, and there must be no proscribed conduct by the employer after the publication. *Id.* at 138-39.

In the instant case, AutoZone's conduct failed to meet the *Passavant* standards. The record lacks any evidence of AutoZone's giving the employees any assurances that it would not engage in any future interference with their statutory rights. Moreover, AutoZone did not refrain from such proscribed conduct. Instead, AutoZone engaged in further unlawful conduct, including a gag rule prohibiting discussion of unions along with a series of coercive threats of retaliation in the event of unionization.

AutoZone argues that the Board should have applied the test as set forth in *Atlantic Forest Products*, 282 NLRB 855 (1987). In *Atlantic Forrest Products* the Board found that even if the *Passavant* test was not satisfied, an action that would otherwise have been a breach could be cured. *Id.* In the *Atlantic* case, the court relied on six factors: (1)

only three employees were told of the restriction, (2) remedial action was taken within one half to three hours, (3) employees were told that it was a mistake to impose the regulation, (4) there was no evidence of further violations, (5) a supervisor testified that he understood that lawful solicitation could occur, and (6) the event occurred on the first day the notice was posted. *Id.* at 872.

AutoZone's timely replacement and apology of the union material, however, still does not satisfy the conditions in *Atlantic Forest*. Unlike the employer in *Atlantic Forest*, AutoZone did not convey to employees that it recognized that its behavior was improper. Further, an undetermined number of employees were affected. Finally, AutoZone's behavior did not change after the remedial action. Therefore, the violation was not cured because AutoZone's behavior can be distinguished from the employer in both *Atlantic Forest* and *Passavant*.

B. Employee Conversation: "The Gag Order"

Employee conversation generally cannot be restricted during work hours so as to prevent discussion about the union while allowing other topics to be discussed. *NLRB v. Olympic Medical Corp.*, 608 F.2d 762, 763-764 (9th Cir. 1979); *Visador Co.*, 303 NLRB 1039, 1041-1042 (1991). However, an employer may restrict campaigning in order to maintain productivity. *Ohmite Mfg. Co.*, 290 NLRB 1036, 1045 (1988); *Adco Elec. Inc.*, 307 NLRB 1113, 1118 (1992).

In the case at bar, the record substantially supports the Board's findings that AutoZone promulgated an unlawfully restrictive "gag rule" on February 11, 1993

and that it implemented the rule through subsequent warnings and admonitions to employees. In early February, Supervisor Schlichting threatened employee Wilson with discharge if he were caught discussing the Union on the job. On February 11, some union supporters protested AutoZone's practice of permitting employee worktime anti-union statements while prohibiting pro-union statements. AutoZone responded with a blanket gag rule prohibiting any worktime talk about the Union, but continued to permit employees to engage in worktime conversations about other topics.

AutoZone continued to implement its policy in mid-February. Supervisor Cunningham told employees that anyone talking for or against the Union would be terminated, and Supervisor Hurley told employees that they did not need to be talking about the Union. In addition, Supervisor Schlichting told employee Andrews that he was not to discuss union issues on company time.

Moreover, as the ALJ noted, the promulgation of this gag rule was unnecessarily restrictive and therefore unlawful. There is no evidence that Union discussion affected production. As the ALJ noted and as reflected by the record, any alleged productivity problem resulted from the employees leaving their work stations and interfering with the work of others, not the topic of conversation.

C. Hyde's Speech

Threats of job loss or plant closure by an employer as a consequence of unionization is a violation of section 8(a)(1) of the Act. *NLRB v. Hovey Elec., Inc.*, 964 F.2d 543,

546 (6th Cir. 1992), citing *NLRB v. Garon*, 738 F.2d 140 (6th Cir. 1984). The test is not actual intimidation or coercion, but whether the conduct tends to be coercive or interfere with employees' exercise of their rights. *NLRB v. Elec. Steam Radiator Corp.*, 321 F.2d 733, 736 (6th Cir. 1963); *NLRB v. Okun Bros. Shoe Store, Inc.*, 825 F.2d 102, 105 (6th Cir. 1987), *cert. denied*, 485 U.S. 935 (1988).

In the case at bar, the Board found that AutoZone Chairman and CEO Hyde's February 19 speech to Greenville employees contained threats of job loss and plant closure in the event of unionization. Those findings are substantially supported by the record. An employer violates section 8(a)(1) of the Act by campaigning against the union on the basis that strikes are an inevitable result of unionization. *NLRB v. Thomas Products Co.*, 432 F.2d 1217, 1218 (6th Cir. 1970). Similarly, it is unlawful for an employer to tell employees, without more, that they could lose their jobs to permanent replacements in the event of a strike. Employees must be told of their rights if they return unconditionally from a strike. *Laidlaw Corp.*, 171 NLRB 1366, 1368-1367 (1968), *enforced*, 414 F.2d 99 (7th Cir.), *cert. denied*, 397 U.S. 920 (1969). One of these rights is that employers must place permanently replaced strikers on a preferential hiring list if they return unconditionally. *Larson Tool & Stamping Co.*, 296 NLRB 895 (1989). When threat of permanent replacement is combined with job loss, it is not reasonable to infer that an employee will interpret this to mean that a *Laidlaw* right exists. *Baddour, Inc.*, 303 NLRB 275 (1991).

The Board found and the record substantially supports that Chairman Hyde's speech contained both a

threat of plant closure and permanent loss of employment. Hyde told the employees his concerns about a union election victory given his personal experience that the Teamsters strike "100% of the time." Words such as these, as noted by the ALJ, convey the message that a successful vote for the Union will lead to a strike. *See U.S. Electrical Motors v. NLRB*, 722 F.2d 315, 321 (6th Cir. 1983), *cert. denied*, 467 U.S. 1216 (1984). In addition, Hyde emphasized that AutoZone's striking employees at its Memphis and Sikeston distribution centers "were all replaced" and that "none of them have gotten their jobs back to this day." This statement, which equates lawful strikes with permanent replacement and job loss, fails to mention the striker's *Laidlaw* rights, and is therefore unlawful. Finally, although Hyde did not expressly state he would close the facility, his statement conveyed that message. Hyde stated "[I]f I let anyone . . . think [the Union] is in charge, I might as well close the doors, put a lock on the gate, and throw away the key. I will not let [the Union], with [its] record and [its] own agenda, destroy what you and I have built." As the ALJ noted, these words convey the message that Hyde would close the plant rather than see the nonunion status of the facility changed.[1]

---

[1] AutoZone contends that Hyde's statements concerning plant closure are noncoercive under *NLRB v. Pentre Elec., Inc.*, 998 F.2d 363 (6th Cir. 1993). This contention is without merit given the differences between the two speeches. In *Pentre*, this Court, in finding the statements to be lawful, noted the statements in question were objective, contained nothing indicating plant closure or similar consequences to result from action by company officials acting on their own volition, and were not interspersed with antiunion statements. In the case at

D. AutoZone's Withholding of Employee Pay Increase

An employer violates section 8(a)(1) of the Act by withholding a previously planned, promised, or scheduled employee benefit during an attempt at union organization. *Southern Moldings, Inc. v. NLRB*, 715 F.2d 1069, 1074 (6th Cir. 1983). Similarly, withholding of a promised benefit can violate section 8(a)(3) of the Act, particularly where the employer's action was motivated by a discriminatory intent to discourage employees from engaging in organizational activities. *See Turnbull Cone Baking Co. v. NLRB*, 778 F.2d 292 (6th Cir. 1985), *cert. denied*, 476 U.S. 1159 (1986); *NLRB v. Shelby Memorial Hosp. Ass'n*, 1 F.3d 550, 557-58 (7th Cir. 1993); *Gupta Permold Corp.*, 289 NLRB 1234, 1234-1235 (1988). Although an employer commits an unfair labor practice by engaging in protected activities and gives pretextual reasons for the discharge, the employer's anti-union animus must contribute to the discharge for the actions to be unlawful. *Turnbull*, 778 F.2d at 296.

In the instant case, the record fully supports the Board's finding that AutoZone withheld a planned and expected pay adjustment it would have otherwise granted based upon the relevant factors indicating that employees were due for a raise. Moreover, the Board found and record substantially supports that AutoZone discontinued its pay adjustment process and postponed a

---

bar, Hyde's statements reflected a subjective and personal hostility toward the Union, a defiant attitude toward the prospect of dealing with the Union, and plant closure statements both threatening and gratuitous.

pay increase at Greenville because of the Union's petition and the Union activities of its employees.

The record reflects that a wage adjustment at the Greenville Distribution Center was anticipated as a part of AutoZone's wage adjustment process for January 1993 and that AutoZone communicated to its employees its intention to grant a wage adjustment. AutoZone had followed a practice of granting an annual adjustment in January to employees at each of its distribution centers where local wage surveys indicated that an adjustment was needed in order to remain competitive in the local labor market. In addition, Vice President Roberts received a preliminary report in November that showed an increase in salary would be required to keep the center competitive and told employees in December that he expected the raise to be between 4 and 5%. On January 11, 1993, all reports and wage survey data were available, and adjustments were implemented in the centers excluding the Greenville facility. Under its established policy, the data would have warranted an increase of 4 to 5 percent. After halting its pay adjustment process for the Greenville Distribution Center, Vice President Roberts announced in his January 22 speech that his earlier forecasts had been tentative, that the expected wage adjustment was being withheld, and that the filing of the Union's representation was responsible.

In his speech, Roberts stated the pay increase was withheld because it would have been illegal. The ALJ discredited this testimony. The function of the ALJ is to resolve credibility problems, and this Court will "not normally disturb the credibility assessments of the Board or the . . . [ALJ] who has observed the demeanor of the

witnesses." *NLRB v. Norbar, Inc.*, 752 F.2d 235, 239 (6th Cir. 1985). Accordingly, credibility determinations affirmed by the Board must be upheld on review unless they are shown to be unreasonable. *NLRB v. Baja's Place*, 733 F.2d 416, 421 (6th Cir. 1984). Here, AutoZone has failed to show any basis for disturbing the credibility determinations by the ALJ, all of which were affirmed by the Board.

As the Board noted and as supported by the record, Roberts exploited his decision and the resulting wage adjustment denial, using it as a weapon during his January 22 speech. He blamed the Union for tying [sic] AutoZone's hands and strongly implied that a vote against the Union would restore AutoZone's freedom to grant the pay increase. Intensifying this exploitation, Roberts falsely told employees after the speech that the pay increases taking effect at the other distribution centers averaged from 12 to 15 percent. As the ALJ reasonably inferred, this exaggeration of the average increases at the other distribution centers was calculated to maximize the anger of the Greenville employees toward the Union.

AutoZone argues that the employees had no right to expect an increase because its history had been erratic in both timing and amount. This contention is without merit and was properly rejected by the Board. First, the record shows that there had been an annual average adjustment at Greenville in 1989, 1990, and 1991 and that there was a company wide practice of granting adjustments at all of its distribution centers in January. In addition, the ALJ noted and the record supports that AutoZone led its employees to believe that some kind of wage increase would be forthcoming in 1993.

In sum, the record supports the Board's finding that AutoZone suspended its anticipated wage adjustment procedure because the employees had assisted the Union and because AutoZone wanted to postpone the pay increases in order to help defeat the Union at the election.

E. Make Whole Remedy

AutoZone contends that a make whole remedy is inappropriate because the wage program lacks definition. This contention lacks merit. AutoZone asserts that an absence of objective discernible criteria prevented a make whole remedy. *See Travis Meat & Seafood Co.,Inc.*, 237 NLRB 213 (1978), *enf'd denied, NLRB v. Travis Meat & Seafood Co., Inc.*, 653 F.2d 233 (6th Cir, 1980). However, as discussed above, the timing and the process are easily determined. Applying the formula used in the past and at other distribution centers, an amount could be determined. Further, a hearing establishing the amount can be held following enforcement of the order. *Hyatt Corp. v. NLRB*, 939 F.2d 361, 372 (6th Cir. 1991). Therefore, the program has sufficient definition, and a make whole remedy is appropriate.

III. Conclusion

For the reasons stated above, we **DENY** AutoZone's petition to set aside the decision of the Board, and we **GRANT** in full the Board's cross-application for enforcement of its order.

UNITED STATES COURT OF APPEAL
FOR THE SIXTH CIRCUIT

AUTOZONE, INC., Petitioner	)	
v.	)	Case No. 94-6280
NATIONAL LABOR RELATIONS BOARD, Respondent.	)	

PETITION FOR REVIEW AND TO SET ASIDE AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

(Filed Oct. 11, 1994)

AutoZone, Inc. hereby petitions the Court for review and to set aside the Decision and Order of the National Labor Relations Board in Case Nos. 11-CA-15357, 11-CA-15559, 11-CA-15665, and 11-RC-5894, entitled AutoZone, Inc. and General Drivers, Warehousemen and Helpers, Local Union No. 28, International Brotherhood of Teamsters, AFL-CIO, 315 NLRB No. 21, issued on September 30, 1994, to the extent that this Decision and Order finds that AutoZone, Inc. violated the National Labor Relations Act, and to the extent this Decision and Order sets aside the election held on March 5, 1993, due to conduct found objectionable by the Board.

Respectfully submitted this 10th day of October, 1994.

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CERTIFICATE

I hereby certify that on this 10th day of October, 1994, I served a copy of Petition for Review and to Set Aside an Order of a National Labor Relations Board by United States Airborne Express, postage prepaid, upon the following:

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AutoZone, Inc. *and* General Drivers, Warehousemen and Helpers, Local Union No. 28, International Brotherhood of Teamsters, AFL-CIO, Cases 11-CA-15357, 11-CA-15559, 11-CA-15665, and 11-RC-5894

September 30, 1994

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND BROWNING

On March 28, 1994, Administrative Law Judge Richard J. Linton issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Charging Party filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

---

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We note that no exceptions have been filed to the decision of the judge dismissing certain 8(a)(1) complaint allegations nor to his decision overruling Objections 2, 3, 6, 8, and 14.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, AutoZone, Inc., Greenville, South Carolina, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

IT IS FURTHER ORDERED that the election held in Case 11-RC-5894 is set aside and that Case 11-RC-5894 is remanded to the Regional Director for Region 11 to conduct a new election when he deems the circumstances permit the free choice of a bargaining representative.

DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be held among the employees in the unit found appropriate whenever the Regional Director deems appropriate. The Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those employed during the payroll period ending immediately before the date of the Notice of Second Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the election date and who retained their employee status during the eligibility period and their replacements. Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began and who have not been

rehired or reinstated before the election date, and employees engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by General Drivers, Warehousemen and Helpers, Local Union No. 28, International Brotherhood of Teamsters, AFL-CIO.

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear,* 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.,* 394 U.S 759 (1969). Accordingly, it is directed that an eligibility list containing the names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of the Notice of Second Election. The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

Dated, Washington, D.C. September 30, 1994

William B. Gould IV, Chairman

James M. Stephens, Member

Margaret A. Browning, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

AUTOZONE, INC.

Cases **11-CA-15357**
11-CA-15559
11-CA-15665
11-RC-5894

and

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION NO. 28, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO

DECISION
OF
ADMINISTRATIVE LAW JUDGE

Dated: March 28, 1994
Washington, D.C.

Richard J. Linton
Administrative Law Judge

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

AUTOZONE, INC.

Cases 11-CA-15357
11-CA-15559
and **11-CA-15665**
11-RC-5894

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION NO. 28, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO

TABLE OF CONTENTS

Decision 1
Statement of the Case 1
Findings of Fact 3

I. JURISDICTION 3
II. LABOR ORGANIZATION INVOLVED 3
III. THE ALLEGED UNFAIR LABOR PRACTICES 5

A. AutoZone's Business 5
B. Overview of the Organizing Campaign 6
C. Overview of the Allegations and Objections 8
D. AutoZone Waives Motion to Dismiss 8
E. Section 8(a)(1) Allegations 9

1. Eloise Ruth – November 18, 1992 9
   a. Facts 9
   b. Discussion 10

2. Barbara Cunningham – January 13, 1993 10
   a. Facts 10
   b. Discussion 11

3. Eddie Massey, Timothy Schlichting, and Jim Wartinger – January 20, 1993..... 11
a. Facts.....11
b. Discussion..... 13

4. Barbara Cunningham – January 21, 1993.... 13
a. Facts.....13
b. Discussion..... 14

5. Dennis Roberts – January 22, 1993..... 15
a. Introduction.....15
b. Facts..... 16
c. Discussion..... 17

6. Martin Nelson – February 2, 1993.....19
a. Facts.....19
b. Discussion..... 20

7. Rick Ferguson – February 11, 1993.....20
a. Facts.....20
b. Discussion..... 21

8. Timothy Schlichting – February 15, 18, 1993... 22
a. Facts.....22
b. Discussion..... 25

9. Timothy Schlichting – Mid-February 1993... 26
a. Facts.....26
b. Discussion..... 26

10. J.R. Hyde III – February 19, 1993..... 27
a. Facts.....27
b. Discussion..... 29

11. Barbara Cunningham; Marshall Hurley – Mid-February 1993.....30
a. Facts.....30
b. Discussion..... 31

12. Timothy Schlichting – mid-February 1993....31
a. Facts.....31
b. Discussion..... 32

13. Jerome Flowers – February 24, 1993.....32
a. Facts.....32
b. Discussion.....34

14. Barbara Cunningham – March 5, 1993.....34
a. Facts.....34
b. Discussion.....35

15. Rick Ferguson – March 16, 1993.....35
a. Facts.....35
b. Discussion.....37

F. Section 8(a)(3) Allegations.....38

1. Withholding pay increase – January 22, 1993....38
a. Introduction.....38
b. Discussion.....40

2. Jackie McGinnis denied cutter position March 18, 1993.....43
a. Facts.....43
b. Discussion.....45

3. James Andrews warned July 9, 1993.....47
a. Facts.....47
b. Discussion.....52

4. Stanley Phillip Wilson fired September 13, 1993.....53
a. Introduction.....53
b. Facts.....54
c. Discussion.....63

IV. THE UNION'S OBJECTIONS 64

A. Introduction.....64
B. The Objections.....65

1. Objection 1.....65
2. Objection 2.....65
3. Objection 3.....65
4. Objection 5.....68

5. Objection 6. 68
6. Objection 7. 69
7. Objection 8. 69
8. Objection 11. 69
9. Objection 14. 69

C. Recommendations. 70

Conclusions of Law. 70
Remedy. 71
ORDER. 71
Appendix – Notice To Employees

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

AUTOZONE, INC.

and

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION NO. 28, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO

Cases 11-CA-15357
11-CA-15559
11-CA-15665
11-RC-5894

Michael W. Jeannette, Esq. (NLRB Region 11), Winston-Salem, NC, for the General Counsel.
James F. Wallington, Esq. (Baptiste & Wilder), Washington, D.C., for Teamsters Local 28.
Cornelius G. Heusel, Esq. and *Tracy K. Hildago, Esq.* and, only on brief, *Robert F. Spencer Jr., Esq.* (Kullman, Inman, Bee, Downing & Banta), New Orleans, LA, for AutoZone.

DECISION

RICHARD J. LINTON, Administrative Law Judge

Statement of the Case

Although discrimination allegations here are important, especially to the individuals, the principal issue probably is whether AutoZone unlawfully announced to employees that, under the law, it could not reach a final decision on a pay raise at Greenville, South Carolina because the Union had filed an election petition to represent the Greenville employees. Finding that announcement unlawful, and AutoZone's freezing of its decision process likewise illegal, I order AutoZone to make that decision and to implement the wage increase retroactive to January 3, 1993, with interest. Based on these and related findings, I recommend that the Board sustain several of the Union's objections, set aside the March 5, 1993 election (which the Union lost by a substantial margin), and direct that a second election be conducted. I dismiss several allegations, including those of discrimination against named individuals.

I presided at this 5-day trial in Greenville, South Carolina, opening December 6, 1993 and closing December 16, 1993, pursuant to the November 9, 1993 Third Order Consolidating Cases, Consolidated Complaint And Notice Of Hearing (complaint) issued by the General Counsel of the National Labor Relations Board through the Regional Director of Region 11 of the Board.[1] The complaint is based on a charge filed and served, in the

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[1] All dates are for 1993 unless otherwise indicated.

first case, on March 15, 1993 by General Drivers, Warehousemen and Helpers, Local Union No. 28, International Brotherhood of Teamsters, AFL-CIO (Union or Teamsters Local 28), International Brotherhood of Teamsters, AFL-CIO (Union or Teamsters Local 28). That charge was amended later, and charges were filed later in the other cases. The charges were filed against AutoZone, Inc. (AutoZone, Company or Respondent).

Issues from the representation case are embodied in the Regional Director's April 29, 1993 Report On Objections, Order Directing Hearing, And Order Consolidating Cases (report on objections, or report). On March 5, 1993 a secret ballot election was held in Case 11-RC-5894 under the supervision of the Regional Director. The Union lost by a vote of 135 to 57. Although the two challenged ballots were insufficient in number to affect the outcome, Teamsters Local 28 filed 13 specific objections with objection 14 protesting "other conduct" by AutoZone. As the Regional Director's April 29 reflects, the Union withdrew objections 4, 9, 10, 12, and 13, and the Regional Director consolidated the remaining objections (1, 2, 3, 5, 6, 7, 8, 11, and 14) with the complaint for hearing. Most of the objections to be heard parallel allegations of the complaint.

In the Government's complaint the General Counsel alleges that AutoZone violated Section 8(a)(1) of the Act, 29 USC 158(a)(1), by various economic threats, promises, interrogation, and other conduct between about November 18, 1992 and about March 16, and that AutoZone violated Section 8(a)(3) of the Act, 29 USC 158(a)(3), by withholding a scheduled wage increase since about January 22, by failing about March 18 to offer a cutter position

to Jacqueline McGinnis, by issuing a (written) warning to James Andrews about July 9, and by firing Stanley Phillip Wilson about September 13, 1993.

By its answer AutoZone admits certain facts but denies violating the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel (who attached a proposed order and notice to the Government's brief), Teamsters Local 28 (the Union adopts the Government's brief respecting the unfair labor practice portion of the case), and AutoZone, I make the following:

Findings of Fact

I. JURISDICTION

A Nevada corporation, AutoZone has an automotive parts warehouse at Greenville, South Carolina. During the past 12 months, AutoZone purchased and received at its Greenville facility goods and materials, valued at $50,000 or more, direct from points outside South Carolina. At all material times, I find, AutoZone has been an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. LABOR ORGANIZATION INVOLVED

Complaint paragraph 6 alleges that Teamsters Local 28 is a labor organization within the meaning of Section 2(5) of the Act. In its answer to complaint paragraph 6, AutoZone asserts that the allegation "is a legal conclusion

which the Respondent is not required to admit or deny." The General Counsel did not move to deem this response as an admission. At trial neither the General Counsel nor the Union adduced direct evidence on this allegation. Thus, when the Union called the organizer, David M. Barry, the examination (although adducing evidence about employees participating in the organizing) was not expressly directed toward establishing labor organization status. (2:265).[2] On brief the parties advance opposing arguments, with AutoZone going beyond the position in its answer to argue that the parties were on notice by that answer that the Union's status as a labor organization was in dispute.

Under Section 2(5) of the Act, only three simple requirements have to be met to establish labor organization status. First, an organization or group of any kind. Second, that employees participate in the organization. And third, that the organization exists, at least in part, for dealing with employers concerning such matters as wages, hours, or working conditions. These requirements are interpreted liberally. ***NLRB v. Cabot Carbon Co.***, 360 U.S. 203, 79 S. Ct. 1015 (1959); ***South Nassau Communities Hospital***, 247 NLRB 527, 529-530 (1980). The three prerequisites are purely factual matters, and the conclusion of labor organization status which flows from these three basic facts is likewise a factual conclusion – even

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[2] References to the five-volume transcript of testimony are by volume and page. Apparently because the transcript for December 15, 1993 (the fourth day of the hearing) is a bit large at 309 pages, the court reporting service divided the day into two volumes. I have restrung the day as a single volume, volume 4 of the transcript.

though the factual conclusion also coincides with the definition set forth in Section 2(5) of the Act and may be expressed as a legal conclusion. Thus, AutoZone was required by 29 CFR 102.20 to admit, deny, explain, or state that it lacked knowledge.

Ample evidence in the record shows that the Union meets the first and third requirements. Only as to the second condition is there any question, and even then only if participation "in the organization" means membership rather than such activities as signing union authorization cards or serving on an organizing committee. As the Board has found that the mere act of signing authorization cards constitutes the required participation, it is clear that membership is not required.

Electrical Construction & Maintenance, 307 NLRB 1247 fn. 1 (1992). Serving, as employees did here, on the Union's organizing committee, also constitutes, I find, the participation required by the statute. Thus, I find that the Union satisfies the three prerequisites. Moreover, AutoZone was well aware of the three basic facts as of the time it filed its answer. Common sense dictated that it form the factual conclusion and admit complaint paragraph 6 – in the same manner that it admitted to the Section 2(11) status of the supervisors alleged in complaint paragraph 7.

In this case we do not have some employee committee whose status as a labor organization might, in good faith, be questioned. We have here the Teamsters. In addition to its own status, the Teamsters is affiliated with the AFL-CIO. C.D. Gifford, **Directory of U.S. Labor Organizations 3**, 53, 57-59 (1992-1993 ed., BNA). No

doubt there are thousands of Board cases in which Teamsters locals, and the International, have been found to be statutory labor organizations. These include cases where I have presided, such as ***Browning-Ferris Industries,*** 306 NLRB 682, 683 (1992). Finally, the board has held that a local of the International Teamsters is a statutory labor organization by virtue of its status as a local. ***Story Oldsmobile,*** 244 NLRB 835, 836 fn. 1 (1979) (with representation documents there similar to those here). I find that Teamsters Local Union No. 29 is a labor organization within the meaning of Section 2(5) of the Act.

In light of the foregoing, and AutoZone's refusal to answer the allegation of labor organization status, AutoZone's continued litigation of the matter appears akin to requiring NLRB Region 11 to prove that it is part of the Agency. AutoZone's continued resistance to admitting what it obviously knows amounts to nothing more than an effort to be argumentative – at the expense of the taxpayers who are funding this proceeding. (A stipulation in the briefs would have served nicely.) In a similar context, respecting resistance to a subpena [sic] duces tecum, the Supreme Court wrote, "A subpoena has never been treated as an invitation to a game of hare and hounds, in which the witness must testify only if cornered at the end of of the chase." ***U.S. v. Bryan,*** 339 U.S. 323, 331, 70 S.Ct. 724, 730, 94 L.Ed. 884 (1950). That, plus additional language, the Sixth Circuit described as "this guiding philosophy of the Supreme Court." ***NLRB v. Strickland,*** 321 F.2d 811, 813, 53 LRRM 2994 (6th Cir. 1963). Lawyers appearing in Board proceedings should follow that "guiding philosophy of the Supreme Court."

The General Counsel now requests (Brief at 4 fn.3) that I assess the facts here under ***Graham-Windham Services,*** 312 NLRB No. 199 fn. 2 (1993) (sanctions of strong disapproval and warning under 29 CFR 102.21). Lawyers must pay attention to the topic of possible sanctions in Board proceedings, for it is clear that the Board is serious about sanctioning lawyers who act in bad faith in Board proceedings, such as filing frivolous pleadings which consume Agency time and the taxpayers' money without legitimate cause. Thus, in addition to ***Graham-Windham Services,*** see ***National Football League,*** 309 NLRB 78, 86 (1992) (104.44 sanctions hearing directed over possible trial misconduct); ***Worldwide Detective Bureau,*** 296 NLRB 148 fn. 2 (1989) (102.21 sanctions of strong disapproval and warning); and ***M.J. Santulli Mail Service,*** 281 NLRB 1288 fn. 1, 1289-1290 (1986) (102.21 sanctions of strong disapproval and warning).

The General Counsel does not affirmatively move for any specific sanctions. AutoZone does not address the matter, perhaps because it may not have read the General Counsel's brief. That is one reason a request for sanctions should be by separate document, a motion, served on the opponent, requesting a specific order. I also consider the fact that neither the General Counsel nor the Union expressly covered the matter at trial. Although I therefore decline to address the issue of possible sanctions, I express confidence that AutoZone's attorneys will give due attention to this area in future cases before the Board.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. AutoZone's Business

AutoZone sells automotive parts in its retail stores across the country. To supply these stores, AutoZone (as of early 1993) operates a distribution center in each of five cities: Phoenix Arizona, San Antonio Texas, Lafayette Louisiana, Memphis Tennessee, and Greenville South Carolina. The Greenville DC (distribution center), the facility involved here, serves AutoZone's retail stores in Georgia, North Carolina, and South Carolina. (4:683, 812-813). There is some reference in the record to warehouses at other locations. (4:603; GCX 3 at 6; CPX 8).[3] It is unclear whether a warehouse may be something different from a DC.

For some years AutoZone was a division of Malone & Hyde, but since 1989 AutoZone has been an independent company. AutoZone's corporate headquarters is located at Memphis. J.R. Hyde (apparently J.R. Hyde III) is AutoZone's chairman and CEO, Peter Formanek president and COO, and Tom Hanemann executive vice president of stores and distribution. [A news item in the March 17, 1994 **Wall Street Journal**, at B8, reports that Formanek is resigning effective April 30, with Hanemann succeeding to his post.] Each has his office at the Memphis corporate office. Within the corporation the retail stores are a separate division from the distribution centers until they reach Hanemann's level. Thus, Dennis Edward Roberts is

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[3] Exhibits are designated GCX for the General Counsel's, CPX for the Charging Party Union's, and RX for those of the Respondent, AutoZone.

vice president of distribution, and he reports to Hanemann. Reporting to Roberts are regional operation managers (ROMs), who are not named in the record. The individual DC managers report to the ROMs who, as noted, report to Roberts. (4:810-812, 883).

Rick Ferguson has been manager of the Greenville DC since October 1991, (2:96; 3:520), and during the relevant time Ferguson had a number of supervisors reporting to him. Although Ferguson normally reports to a ROM rather than to Roberts, it is clear the during the Union's organizing campaign here that Ferguson frequently worked directly with Dennis Roberts. (3:506, 516-517; 4:813, 854; 5:938). As we shall see, for example, they made joint speeches to the Greenville employees. (GCX 2; RX 17; CPXs 7,10).

B. Overview of the Organizing Campaign

The Union's organizing campaign at AutoZone's Greenville DC began around October-November 1992, and some employees openly began wearing Union pins by November and early December 1991. (1:31, 35; 3:350, 453-454, 467). DC Manager Rick Ferguson acknowledges learning of the activity about early December. (2:98). By mid-December or so Ferguson began a training program for his supervisors as to what they were not to do in a campaign. (4:660). Ferguson instructed Supervisors ("advisors" at AutoZone) that, respecting employees' union activities, they were not to threaten, interrogate, promise, or spy. The first letters of the four forbidden activities give rise to the acronym by which the instructions are called: TIPS. The TIPS training occurred almost

daily. (4:610-611, 665-666, 689, 775, 862, 888; 5:908; CPX 11 at 4).

By January 6 the Union's campaign reached the point where the Union sent a telegram (RX 13) demanding recognition and offering to demonstrate its majority status. [Although no party objected to the offer of RX 13 (4:850), I failed to receive it in evidence. I do so now.] The following day, January 7, the Union filed its petition (CPX 4) for a representation election in a unit of warehouse employees. By letter dated January 8 (RX 14) Ferguson declined the Union's demand for recognition. On January 11 Ferguson posted a notice (TX 15) to all personnel advising them of the petition and AutoZone's opposition. By letter of January 19 the Union encouraged AutoZone to give employees pay raises "currently due" to "some" employees, and warned that charges would be filed for numerous violations of the Act. (GCX 5). AutoZone did not respond to the Union's letter. (4:858-859).

During the campaign AutoZone's management delivered prepared-text speeches to groups of employees as one means of communicating AutoZone's position on the issues. Vice President Dennis Roberts describes the purpose of the meetings as "educational," to present the facts concerning union representation. (4:863, 881). DC Manager Ferguson testified that six speeches were given, with each speech delivered, on average, to 15 small groups of employees in order to cover all employees. (5:924-925, 979-980). Each meeting lasted about an hour. (5:926).

On January 22 AutoZone gave the first (so far as the record shows) of its speeches by management to groups

of employees. Ferguson and Roberts divided this relatively short speech (GCX 2) of eight double-spaced pages. This was followed by a lengthy question and answer session. As with the other speeches in evidence, employees tape recorded the question and answer session, a transcript of which (pages 6-33) is in evidence as CPX 1. (2:336-340). Ferguson and Roberts delivered a second speech on January 25 (RX 17;4:873).

On January 27, in Case 11-RC-5894, the Regional Director for NLRB Region 11 approved a stipulation (CPX 5) by the parties to conduct an election on March 5 in the following bargaining unit:

> All full-time and regular part-time warehouse, maintenance, and housekeeping employees, and all full-time and regular part-time truckdrivers employed by the Employer at its Greenville, South Carolina location; excluding all office clerical employees, line leaders, guards, and supervisors as defined in the Act.

On February 1 Ferguson and Roberts delivered the third speech (CPX 7). By letter (GCX 4) of the same date, the Union sent AutoZone a list of 32-named employees serving as the Union's organizing committee. The letter warns AutoZone not to violate federal law respecting the statutory rights of employees to organize. Beginning with the February 1 speech, AutoZone excluded employees wearing union insignia on the basis their minds were closed to AutoZone's educational training. (2:112-113; 4:881; 5:925, 974, 979). Ferguson and Roberts delivered their fourth speech (CPX 10) on February 8.

By two-page letter (CPX 8) dated February 16 Roberts wrote employees describing past strikes by the Teamsters

at other warehouse locations and urging employees to vote NO on March 5. (3:534). On February 19 J.R. Hyde III, AutoZone's chair and CEO, delivered a speech (GCX 3) to employees in which, on the last of 12 double-spaced pages, he urges them to vote No on March 5. (2:292, 325). The Hyde speech is the fifth one so far as the record shows. If a speech was given the preceding week (the week of February 11), it is not identified and no text is in evidence. Moreover, if a speech was given the week of February 22 or the following week on March 1, 2, or 3, its text is not in evidence. The text of a sixth speech (CGX 14), a short address by Ferguson on March 16, is in evidence. That speech came after the election, but during the objections period.

The March 5 election was held in two sessions, 8:30: a.m. to 11 a.m. and 1 p.m. to 2:30 p.m. (CPX 5; 3:400). Of approximately 203 eligible voters, 135 employees voted No, 57 voted Yes, and only 2 ballots were challenged. The Union had lost. Thereafter the Union filed objections, and on April 29 the Regional Director for NLRB Region 11 issued his Report On Objections (GCX 1i) approving the Union's withdrawal of several objections and directing a hearing on Objections 1, 2, 3, 5, 6, 7, 8, 11, and 14. (GCX 1i at 8). For the most part these nine objections parallel allegations in the complaint.

C. Overview of the Allegations and Objections

Complaint paragraph 8 contains the allegations of independent violations of Section 8(a)(1) of the Act (the other 8(a)(1) alleged derives from alleged violations of

Section 8(a)(3) of the Act). The alleged independent violations begin with an alleged threat by Eloise Ruth about November 19, 1992 and continue with other economic threats, interrogations, promises, and other conduct through about March 16 when DC Manager Ferguson allegedly threatened to withhold pay raises due employees because of their support of the Union. The 8(a)(3) paragraphs allege that since January 22 AutoZone has withheld scheduled pay increases due unit employees because the Union filed a representation petition, that since about March 18 AutoZone has failed to offer a cutter position to Jacqueline McGinnis, that about July 9 AutoZone issued a written warning to James Andrews, and that about September 13 AutoZone fired Stanley Phillip Wilson. AutoZone denies all the 8(a)(1) allegations and the first of the 8(a)(3) allegations (withholding a scheduled pay increase), but admits that it did not offer McGinnis a cutter's job, that it warned James Andrews on July 9, and that it fired Stanley Phillip Wilson on September 13. AutoZone denies any unlawful motivation. As noted, most of the Unions' objections parallel allegations of the complaint and, in some instances, expand on them.

At trial the General Counsel withdrew one of the independent allegations, paragraph 8(p), as unsupported by any evidence. I granted the motion. (3:550-552). On brief (at 6 fn.5) the General counsel also moves to withdraw a related allegation, paragraph 8(q), apparently for the same reason as AutoZone observes in its brief (at 9 fn. 5). I grant that motion also.

D. AutoZone Waives Motion to Dismiss

After the General Counsel (3:500) and the Union (3:536) had rested their cases in chief, AutoZone made a lengthy motion to dismiss the complaint. (3:536-553). When I denied its motion to dismiss, AutoZone proceeded with its defense. (3:553). A respondent tests the sufficiency of a prima facie case by resting on its motion to dismiss the complaint. It must elect whether to rest or to proceed, for if it proceeds it waives the motion. By proceeding with its own case in chief rather than resting on its motion to dismiss, AutoZone waived the motion to dismiss. ***Peter Vitalie Company,*** 313 NLRB No. 162, JD slip op. at 3-4 (Mar. 2, 1994). I therefore shall consider all the evidence in the entire record in reaching my decision. ***Peter Vitalie,*** id.

E. Section 8(a)(1) Allegations

1. Eloise Ruth – November 18, 1992

a. Facts

Complaint paragraph 8(a) alleges that on November 18, 1992 Eloise Ruth threatened employees with more onerous working conditions if they selected the Union as their collective bargaining representative. Reuben Rice testified in support of the allegation, with Ruth supporting AutoZone's denial.

Rice, who left AutoZone in June 1993, worked as an order selector pulling parts such as starters and alternators. (3:452, 475). About October 1992 Rice had his first contact with union representatives or supporters, and in November he began wearing, occasionally, a union pin.

Eventually Rice served as an observer for the Union at the March 5 election. (3:453-454, 467-468).

Rice apparently worked in the section where Eloise Ruth is the line leader. Although line leaders later were excluded from the stipulated bargaining unit (CPX 5), line leaders are hourly paid and, as Rice concedes, serve as the lowest level supervisors. (3:454, 470; 4:690). The complaint lists Ruth among the statutory supervisors, and in its answer AutoZone admits that allegation of supervisor status.

Rice testified that, apparently in November 1992, he would tell Ruth why he was supporting the Union. (3:469). At that time he considered Ruth a friend and he confided in her on occasion. They voluntarily discussed union matters. (3:471). In mid-November, Rice testified, Ruth, in the same sentence, told Rice that if he continued his support of the Union and his dating of a specific (unnamed in the record) white woman that Ruth would make Rice's job harder on him. (3:454, 471-472). Both Rice and Ruth are black. (3:471, 474). Rice initially admitted that he, in one or more conversations, had told Ruth that she should support the Union rather than siding with whites (3:472), but, reversing position and denying that statement, testified he told Ruth that if the employees voted in the Union it would produce an equal opportunity for everyone. (3:473-474).

Line Leader Ruth asserts that Rice would initiate conversations with her about the Union, promising that the Union could get better benefits for her on insurance, uniforms, and the like. Ruth denies telling Rice that she would make his job harder if he "voted" for the Union,

and she denies threatening Rice in any way. (4:693-694). Ruth does not expressly address the matter of a conversation with Rice about his dating of a white woman.

b. Discussion

Crediting Ruth rather than Rice, I find that Rice seized the occasion of this case to retaliate against Ruth because she disapproved of his interracial dating. To accomplish this, Rice simply modified Ruth's threat about dating to include a reference to the Union. I shall dismiss complaint paragraph 8(a).

2. Barbara Cunningham – January 13, 1993

a. Facts

Complaint paragraph 8(b) alleges that on January 13 Supervisor Barbara Cunningham threatened to withhold pay increases due employees because of their support for the Union. Robin Delk is the principal supporting witness, with Cunningham supporting AutoZone's denial.

Robin Delk worked for AutoZone from July 1991 to April 1993. (3:349). Delk worked as an order selector under Barbara Cunningham and was an early and open supporter of the Union. (3:349-350). Supervisor Cunningham held a sectional meeting in the warehouse after lunch on January 13, Delk testified, with some 100 employees attending. (3:350-351, 364). Delk was standing in a group to one side which included Janette Hanson, Paul Henry, Jackie McGinnis, Reuben Rice, and others. (3:351, 370). At one point during the meeting Delk, as she

testified, asked Cunningham when she would receive her (regular progression) pay increase which then was about due. Cunningham said that Delk would not receive a raise because of the support of the Teamsters by the warehouse employees. Delk responded that her raise should depend on her evaluation, and her job performance, not on the level of union support in the warehouse. Cunningham replied that Delk needed to talk to her fellow employees about the union support. (3:351, 369). Cunningham had turned to face Delk and Delk does not know whether employees on the other side of the area could hear the exchange, particularly since some of the employees were talking among themselves. (3:365, 369-372). Following the exchange, and while she was still standing at the meeting, Delk made some notes about the exchange, but she did not bring those notes to the hearing. (3:363, 376-377). Within 10 days Delk was evaluated by Cunningham and received her progression increase. (3:351-352, 364, 367-368, 372). Cunningham recalls the evaluation review as being about January 21, her birthday. (4:777-778).

Jackie McGinnis recalls Delk's question coming as the meeting (in late January) ended and as employees were leaving the area, with Cunningham telling Delk to ask the Union where her raise was. Delk just turned and laughed. McGinnis asserts that the only ones then present were Delk, McGinnis, Hanson, and Cunningham. The three employees, open supporter of the Union, were wearing their Union insignia. (2:233-235, 256-259). Disagreeing with McGinnis, Delk firmly states that the meeting had not ended. (3:364). Janette M. Hanson describes a reference to a question, by someone, of when employees were

going to receive their raise, with Cunningham replying that the raise was frozen until after "all this was over." (1:16-17). Hanson does not describe any specific exchange between Delk and Cunningham, nor does Reuben Rice. Paul Henry, also named by Delk, did not testify. McGinnis asserts that it was employee Joe Smith who, during the meeting, asked Cunningham whether she had heard anything on their raises, with Cunningham answering "No." (2:257).

Hired as the first employee when the facility opened in October 1986, Barbara Cunningham began as the center's receptionist. She progressed through a series of positions, including personnel manager (1988-1989), then to order selector advisor, and finally, about March 1, 1993, to Assistant DC Manager. (4:771, 796-797). Cunningham recalls no question at a group meeting by Delk about a pay raise, denies telling her at a meeting that Delk should ask the Union about her pay raise, asserts that she would not have said. "Go ask the Union," and denies discussing, immediately following a group meeting, a pay raise with Delk, Hanson, and McGinnis. (4:773-776, 779).

b. Discussion

Differences by corroborating witnesses on details are not unusual, but the differences here are substantial. The General Counsel does not suggest how the differences are to be reconciled. In view of the TIPS training Cunningham had received, the fact that some 100 employees were present, with several, perhaps many, wearing insignia of the Union, the Hanson version certainly seems to

support Cunningham. Unable to credit Delk or McGinnis, I shall dismiss complaint paragraph 8(b).

3. Eddie Massey, Timothy Schlichting, and Jim Wartinger – January 20, 1993

a. Facts

Complaint paragraph 8(d) alleges that on January 20 Eddie Massey, Timothy Schlichting, and Jim Wartinger removed prounion literature from canteen bulletin boards while leaving antiunion literature posted. Reuben Rice testified in support of the allegation, with Massey and Schlichting supporting AutoZone's denial. Massey is AutoZone's transportation advisor (4:695) and Schlichting was then an advisor [supervisor] over three department, Returns, Maintenance, and Housekeeping Schlichting left AutoZone for another company about August 1, 1993. (4:608-610).

According to the distance estimate by Reuben Rice, the beginning of his first floor work area is some 30 feet from the canteen, or employee breakroom, which is situated at the second floor level. A large clear glass window forms the top portion of the canteen wall and faces out onto the warehouse floor. The bottom portion of the canteen wall is concrete and reaches up to a point above waist level. (3:456-457, 475-482, 638). There are several company bulletin boards inside the canteen, and on one of them employees may post classified sales and other personal notes. (4:636, 696, 866, 892). From the glass wall to the employee bulletin board is about 20 feet. (3:481).

As he was standing at the front of his work area on January 20, Rice testified (3:456, 475), and looking up through the second floor glass portion of the canteen wall and across the canteen to the bulletin board, he observed Massey, Schlichting, and Wartinger standing at the employee bulletin board. As Rice watched, he saw Schlichting remove three or four letter-size union flyers which, previously posted by Rice, addressed such matters as management salaries. Although antiunion matter also was posted on the board, Schlichting left the antiunion matter posted. (3:455-457, 484-486). When Vice President Dennis Roberts came by about 30 minutes later, Rice complained to him about the removal. Roberts said he would take care of it. By the end of the shift, about 3 hours later, Rice observed that the flyers had been reposted. Roberts apologized to Rice for the removal. (3:486-487).

Schlichting denies removing any union flyers, or seeing anyone do such. (4:637). Massey denies that any of the three removed any union items. (4:697). Schlichting (4:637) and Massey (4:697) claim they saw a cardboard poster fall to the floor (blown down by wind from a fan) while they stood there. In his testimony Roberts does not address the report by Rice that Roberts said he would take care of the matter, that the flyers were reposted within 3 hours, and that Roberts apologized.

Ferguson testified that following Rice's testimony he measured the distance required to view the canteen bulletin board from the warehouse floor. At 6 feet 2 inches, Ferguson had to stand 132 feet from the bulletin board in

order to see the posted items. As Ferguson's measurement apparently was made on the floors of the warehouse and the canteen, rather than measuring the line of sight, the measurement does not include whatever extra distance would be added to the warehouse floor distance in order to raise it up and link it to a line-of-sight straight line. (5:909-910). No witness was called in rebuttal to contradict Ferguson's measurements. Ferguson concedes that he and Roberts did not question Rice's line of vision, or that he observed what he protested, on the day in question. (5:972). I estimate that Rice stands about 5 feet 11 inches, or slightly under 6 feet, in work shoes.

No expert in mathematics testified concerning whether, calculating the math of distance and angles, a person in Rice's position could have looked over the second floor concrete wainscot [apparently anywhere from 42 to 48 inches high], through the glass portion of the wall, across the 20 to 24 foot canteen, and have seen the level at which items were posted on the bulletin board. Moreover, there is no estimate for the height of the first floor wall. Whether the wall measures 9 feet, 10 feet, or something different, is not shown in the record.

b. Discussion

I need not resolve this question of geometry (there are not enough measurements in any event), for Vice President Roberts, in effect, admits Rice's version. Indeed, after Roberts reassured Rice the matter would be taken care of, the items were reposted that afternoon. Moreover, Ferguson admits that Roberts told him about Rice's protest, and they did not question Rice's version

on the day of the event. Accordingly, whether Rice actually saw the removal, or someone in the canteen reported it to him, is immaterial. Crediting Rice's account, as admitted by AutoZone, I find that AutoZone violated Section 8(a)(1) of the Act as alleged. I further find that the reposting did not effectively disavow the effects of the discriminatory removal under ***Passavant Memorial Area Hospital,*** 237 NLRB 138 (1978).

4. Barbara Cunningham – January 21, 1993

a. Facts

Complaint paragraph 8(e) alleges that on January 21 Barbara Cunningham interrogated employees regarding their union sympathies and desires. Robin Delk testified in support of the allegation, with Cunningham supporting AutoZone's denial.

As earlier noted, Robin Delk testified that a week to a week and a half after Cunningham's January 13 sectional meeting, during which Delk asked about her progression wage increase, Cunningham conducted her evaluation interview. (3:351-352, 367-368, 372). Cunningham recalls that it occurred about her birthday, January 21. (4:778, 782). Delk considered the evaluation good, and she was told that she was getting a pay raise and the amount of her pay increase. (3:352, 372-373; 4:777). There is no dispute that before the January 21 evaluation interview Cunningham knew of Delk's open and outspoken (wearing union pin, union jacket, and handbilling) support of the Union, and Delk was wearing her union pin during the January 21 interview. (3:368, 372). Cunningham suggests that Delk had expressed her

union support to Cunningham in earlier conversations (4:776, 778), and (on a leading question) that the position was unsolicited by Cunningham (4:779). Denying any prior conversations with Cunningham about the Union (3:375), Delk observes that her father, a 25-year member of the Union, makes regular stops at the Greenville warehouse, she visits with him on some of those occasions, and that his union membership in the Teamsters is common knowledge. (3:375).

Delk testified that after the evaluation portion of the interview, Cunningham, changing the subject, asked Delk how she felt about the Union and why she supported the Union. (3:352-353, 374). (Although Delk later testified, 3:373, that she did not recall at what point the union topic arose, her initial description, 3:352, puts it after at least some, perhaps all, of the evaluation portion.) Although Delk was wearing a union pin, Cunningham did not explain why she was asking how Delk felt about the Union. (3:374-375).

To Cunningham's questions, Delk replied that she was raised with the Union, that it was strong in her family, and that she believed in the Union. Her father has been a member of the Union for over 25 years, and Delk values the union benefits her father has received. Cunningham responded that she grew up in the North, that she remembered the Teamsters and Jimmy Hoffa, and that she remembered the Teamsters as being violent people who would overturn cars and set fire to property. (3:352, 374, 393-394).

Cunningham's initial description of the interview was in terms of what the customary sequence was rather than what actually occurred. (4:778). Cunningham denies

there was any discussion between them about their opinions on the Union. In answer to a leading question ("Did she [Delk] volunteer . . . "), Cunningham testified Delk volunteered how she felt about the Union, that her father was part of the Union, that she had grown up with it, and that is why she felt that way. To another leading question of whether this was in response to Cunningham's asking a question, Cunningham testified "No." (4:782-783).

b. Discussion

Without hesitation I credit Delk rather than Cunningham. Indeed, Cunningham's answers to the leading questions tend to corroborate Delk's version. Although asking an open supporter of the Union how she feels about the Union seems silly and strange, and therefore not credible, oral statements in conversation generally are not prepared in advance and not as precise and logical as are expressions reduced to writing. In any event it is not the first time such a question has been asked of an open union supporter. See ***Pilliod of Mississippi,*** 275 NLRB 799 fn. 2 (1985).

AutoZone relies on ***Pilliod*** to argue that even if Delk is credited the allegation must be dismissed. I agree. Had Cunningham asked the questions before the evaluation, I would find a violation. Even an open union supporter might well be coerced by such questions occurring at the beginning of a performance evaluation. And whether Delk in fact was, or would be, is immaterial, for actual impact is not the test. Here, however, the questions came after Delk was informed of her good evaluation and of the amount of her pay increase. The questions which

followed merely launched brief position statements by two persons with opposing views.

The General Counsel also argues that Cunningham's reference to violence by the Teamsters under Jimmy Hoffa "is naturally coercive and would cause a reasonable person to reconsider supporting the Union. Thus, Cunningham's remarks to Delk amounted to unlawful interrogation and are violative of the Act." The General Counsel does not assert that Cunningham's description of her experience with the violent acts in the North, such as the overturning of cars and setting fire to property, is untrue. It therefore is no surprise that such violence "would cause a reasonable person to reconsider supporting the Union." But such fact does not make Cunningham's description of her experience in the North unlawfully coercive. By contrast, Delk's experience with the Union, its representatives, as well as her father, has been just the opposite – everything she has seen has been good. And she expressed her view very well to Cunningham, supporting it with the specific benefits she has observed. Robin Delk's father can be justly proud of his daughter's articulate defense of the Union. For the reasons stated, I shall dismiss complaint paragraph 8(e).

5. Dennis Roberts – January 22, 1993

a. Introduction

Complaint paragraph 8(f) alleges that on January 22 Vice President Dennis Roberts told employees "that a pay raise was being withheld because the Union had filed a representation petition."

The question here is whether the final paragraph of the text of the January 22 joint speech (GCX 2) by Roberts and DC Manager Rick Ferguson (they alternated in delivering portions) rises to the violation alleged in paragraph 8(f). (2:325). The final text paragraph of the speech, delivered by Roberts, reads (GCX 2 at 7-8):

> The other issue I want to discuss has to do with the status of pay increases at this D.C. A number of you have asked when or if the 4% to 5% increase we had mentioned back in December would be going through. You need to understand that the numbers we mentioned in December were a tentative forecast only. After that time, we decided to re-evaluate the pay situation in this market. Before we were able to gather all the data we needed and reach a final decision, however, the Teamsters' petition came in. Our understanding of the law is that we cannot make changes in the pay or benefits once a petition comes in, unless the decision had been finalized beforehand. We very much regret that the union's poor timing has now tied our hands, but we do not intend to violate the law. The thing to keep in mind, though, is that once the union is beaten in the election – and we feel confident that that is exactly what is going to happen here – then we will be able to move forward, free of the restrictions that we now live under. We're sorry we cannot be more specific than that now, but we wanted you to understand the legal status of your pay increase at this time.

In this speech, and others, AutoZone vigorously opposes the unionization of its Greenville facility. Clearly and expressly AutoZone (Ferguson speaking), as is its

right, told the employees that AutoZone does not want "the Teamsters or any other union in our operation. We are completely and entirely against this union getting in here and we will take every legal step available to us to keep it out!!" (GCX 2 at 2-3).

Complaint paragraph 9 alleges that AutoZone has violated Section 8(a)(3) of the Act since January 22 by withholding "scheduled pay increases due to its unit employees because the Union filed a representation petition." AutoZone denies the allegation.

The pay increase allegations constitute a principal part of the case. I do not treat the paragraph 9 allegation until later. Paragraph 9 is relevant here, however, because it provides context for the paragraph 8(f) allegation about Roberts' remarks of January 22.

b. Facts

Vice President Dennis Roberts testimonially described AutoZone's pay increase procedure and its background. First, AutoZone has two types of pay increases for its DCs (distribution centers). One is a wage progression advance for an employee's initial 2 years: evaluations and increases at (90 days at Greenville), 6 months, 12 months, 18 months, and 24 months. (4:815, 826). The second is an annual adjustment, inaccurately called a cost of living (COL) increase. (4:815). It is not a true COL because (1) not everyone gets the same increase, and (2) the annual adjustment is based on the results of a market analysis, or area wage survey rather than some COL index. The wage survey is conducted by

the local management. The data collected is passed to the ROM (Regional Operations Manager), and thence to Roberts who, with accounting support, assembles the analysis, forms, and recommendation for AutoZone's president who typically makes a decision based on the data and recommendation submitted. (4:815-816, 839). Because the wage surveys are based on the DCs' geographic areas, the DCs have different pay scales. (4:824). An annual adjustment is a bit of a misnomer, for the adjustments are not guaranteed if the wage survey shows that a DC's payscale is competitive for its area. (4:831).

For several years AutoZone performed its wage surveys, or market analyses, in November with any adjustments implemented in December. AutoZone changed its procedure in late 1991, shifting the survey to December with adjustments made in the following January, the first being January 1992. (4:820-821; GCX 6).

On a routine visit to the Greenville DC in late November 1992, Roberts testified, several employees approached him and asked whether there would be an annual increase and if so how much. Roberts answered that to the best of his knowledge he expected that there would be an increase in the range of 4 percent to 5 percent. He told them that this was not yet confirmed. (4:835-836, 885). To be fair to other employees, Roberts testified, he returned some 2 weeks later, around December 8, 1992, and management held meetings with small groups of employees sharing that same information (there "might" be an annual increase in range of 4 percent to 5 percent) with all employees. The employees also were told that AutoZone was awaiting the results of a market analysis being done in the Phoenix area by the

Hay Group. (4:836-837, 885-886). The day he left Greenville, Roberts received, by overnight mail, an advance copy of the Hay Group's survey, dated December 15, for his review on his return flight to, presumably, Memphis. (4:837-838).

The Hay Group's report indicated to Roberts that AutoZone was no longer competitive in the Phoenix area. That led him to instruct Ferguson, the Greenville manager, to begin a wage survey for the Greenville area. This was done by Ferguson and Personnel Manager Jim Wartinger. They contacted such firms as Wal-Mart which has a warehouse some 20 miles from AutoZone's Greenville DC. (4:839-841). By Friday, January 8, or Saturday, January 9, 1993, Roberts testified, Roberts had received all of the wage survey data. He did not have it before Ferguson met with Wal-Mart on January 6. He made his analysis, with accounting staff support, and gave his recommendation on all DCs, except Greenville on Monday, January 11, to AutoZone's president, who approved it that afternoon with some modification. (4:844-845, 847-848). Although Roberts had all the wage survey data for Greenville, he did not perform his analysis nor finalize a recommendation respecting a pay adjustment at Greenville. (4:845, 848, 862, 884-885, 887, 898).

According to Roberts, he did not learn of the Union's organizing activities at Greenville until Ferguson called him on receiving the Union's telegram (RX 13) after 5 p.m. on Wednesday, January 6, in which the Union demanded recognition. (4:842, 854). After consulting its attorneys, AutoZone concluded that it would be unlawful to implement a pay increase at Greenville. He therefore

put the Greenville data aside, did not complete the analysis for Greenville, and has not done so. (4:846, 848, 862, 885). The analysis was stopped because of concern over legality, and not for the lack of any data. (4:846). Extrapolating from the wage surveys for the other DCs, Roberts testified that the adjustment for Greenville, had it been made, would have been greater than 5 percent. (4:841, 885). Had the analysis been made and an adjustment implemented at Greenville, as it was elsewhere, it would have been effective for the pay period beginning Sunday, January 3, 1993, with the increase reflected in the paychecks issued January 22. (4:842-843).

c. Discussion

The law is settled on this issue. "It is well established that an employer is required to proceed with an expected wage or benefit adjustment as if the union were not on the scene." ***Atlantic Forest Products,*** 282 NLRB 855, 858 (1987). In ***Atlantic Forest*** the Board, continuing, observes that an exception to the rule allows the employer to postpone the wage or benefit adjustment so long as it makes clear to employees that the adjustment would occur whether or not they select a union, and that the "sole purpose" of the postponement is to avoid the appearance of influencing the election's outcome. In making such announcements, however, the employer must avoid attributing to the union the onus for postponement of adjustments in wages or benefits, or disparaging and undermining the union by creating the impression that it stood in the way of their getting planned wage increases and benefits. ***Atlantic Forest,*** id.

In ***Atlantic*** the Board found that the employer's announcement unlawfully attributed to the union the withholding of a regularly scheduled semi-annual wage increase. The statement in issue here is very similar to the employer's announcement in ***Atlantic.*** Thus, although Roberts tells employees that the 4 percent to 5 percent was a tentative forecast, it is based on employees' knowledge of an annual adjustment decision. The December forecast by Roberts, as he asserts, was 4 percent to 5 percent. Thus, an adjustment of some kind, forecast to be in the range of 4 percent to 5 percent, would be made. After the December "tentative forecast," Roberts states, AutoZone decided to reevaluate wage rates in the Greenville market. Before that could be completed and a final decision reached, the Union filed its petition.

Now as we know from ***Atlantic Forest Products,*** the Union's petition is irrelevant – but for one exception. Other than the one exception, an employer, election petition or no, is to proceed as if there is no union on the scene. That is, AutoZone was required to complete its wage survey, to make a final decision, and to implement that final decision – all as if the Union were not there. By one permitted exception, the employer may announce a postponement **provided** it makes clear to employees, (1) the adjustment eventually will occur regardless of the election results; (2) the **sole** purpose of the postponement is to avoid the appearance of influencing the election's outcome; and (3) in making the announcement, the employer must avoid attributing to the union the onus for the postponement, or disparaging or undermining the union by creating the impression that the union stands in the way of the employees getting the planned adjustment.

So stated, ***Atlantic Forest*** establishes (reiterates, actually) the three tests to be applied.

How does AutoZone fare on the three tests? The answer is easy. AutoZone, after a fashion, passes test one, but it fails tests two and three. First, the understanding it expressed about the law is wrong, for, as I have noted, filing of the petition is an irrelevant event, save for one exception. Second, there is no requirement that a decision have [sic] been finalized. (Not misstating the law perhaps is an implied fourth test of ***Atlantic.***)

Consideration of tests two and three show very clearly that the sole purpose of Roberts' announcement was just the opposite of the ***Atlantic*** test two, for the purpose was to encourage a vote NO. A negative vote would be encouraged because Roberts blamed the Union's "poor timing" for the postponement. Incited anger needs an outlet, and voting against the Union in the election would provide that outlet. Not only would Roberts' words incite anger against the Union, and remind employees how to take revenge (beat the Union in the election), but they promise the thrill of victory, after the Union is beaten, in the form of AutoZone's being able "to move forward, free of the restrictions that we now live under." That is, AutoZone would be able to proceed with its pay adjustment process when the Union loses the election. (The subliminal message is that a YES vote will doom any pay adjustment.) His overt message is the same as that found unlawful in ***Atlantic Forest Products.*** It is the "carrot or the stick" approach condemned in ***DTR Industries,*** 311 NLRB 833, 836 (1993). I find that AutoZone, by Vice President Roberts' speech, violated Section 8(a)(1) as alleged by complaint paragraph 8(f).

6. Martin Nelson – February 2, 1993

a. Facts

Complaint paragraph 8(h) alleges that on different dates two supervisors, Marty Nelson (on February 4) and Tim Schlichting (mid-February), threatened employees with unspecified reprisals if they selected the Union as their bargaining representative. Respecting Nelson, James Andrews is the General Counsel's supporting witness, with Nelson opposing. I address the Schlichting allegation under separate heading.

James Andrews began working for AutoZone in August 1992. He works in housekeeping. He became a member of the Union's organizing committee, and in late January 1993 he began wearing a Teamsters pin on his collar. (2:273). Martin Nelson also joined AutoZone in August 1992, as assistant manager of the San Antonio DC. (4:602). As were some managers from other locations, Nelson arrived at the Greenville DC in late January or early February for some training. (4:598, 602).

Andrews testified that in the latter part of February, in the rear of the warehouse, Nelson approached him and, seeing the Union pin on Andrews' collar, asked, "What are you going to do when you lose this election?" Andrews replied that he would just continue doing his job. Nelson did not respond specifically to that, but they did have some general conversation following the initial exchange. (2:278-279, 297-298). At some point Nelson introduced himself. (2:299). Andrews concedes (no objection registered) that Nelson did not say Andrews would lose his job nor was he threatened in any other way.

(2:298-299). However, Andrews asserts, Nelson used a "threatening tone" when he asked what Andrews was going to do after losing the election. (2:299).

Nelson places the conversation as occurring about February 2, the very morning he arrived at the facility. (4:598, 602, 604). Before leaving San Antonio, Nelson was informed of the union campaign at Greenville. (4:602-603). On his arrival at Greenville Nelson was told by Bob Flynn, the assistant manager from the Lafayette DC also there for training, not to engage in any "prolonged" conversations with employees about the Union; just do not talk with them about the union campaign. (4:601, 602). Some days later, after his conversation with Andrews, Nelson, as all members of management, received "guidance" from Ferguson and Roberts not to engage in "prolonged" conversations (4:603-604), or in "any" conversations (4:605) with employees about the Union. This guidance was imparted in an unscheduled meeting with some other managers on the warehouse floor. (4:605-606).

On this morning, Nelson testified, he decided to take an inspection walk around the facility while the local management was in a meeting. (4:598). Nelson was wearing an AutoZone jacket, giving San Antonio as the facility, but not bearing his name. Nelson was aware that AutoZone had certain pins that employees wore, although he was not familiar with all of them at that time. (4:599-600). As Nelson walked by a maintenance area, James Andrews stopped him and asked his identity. Nelson introduced himself. Observing Andrews' pin, he thought it was an AutoZone pin, although he did not recognize it. He could not read the inscriptions because

he was not wearing his reading glasses. (4:599-600, 601). [Nelson appears to be in his fifties, or well past the age when many persons require corrective glasses to read.] "In the course of the conversation," Nelson testified, he told Andrews that he had never seen [that type] pin before. He therefore asked Andrews, "What is that?" Andrews said it was a Teamsters pin. Realizing that Andrews was a [sic] one of the prounion employees, Nelson decided it was best to move along and he began to walk. Andrews asked what Nelson thought about the "whole business," or the "proceedings." Turing to answer as he was walking, Nelson replied, "I hope it all comes out well." Nelson denies threatening Andrews in any way, denies telling Andrews he would lose his job once the election was over (adding that he had no reason to say that), and asserts that this was the only conversation he ever had with Andrews. (4:600).

b. Discussion

The versions of Andrews and Nelson are consistent up to a point. Where they differ, I credit Andrews. Although the General Counsel views Nelson's inquiry as threatening ("What are you going to do when you lose this election?"), I see it as ambiguous, subject to different interpretations. Accordingly, I shall dismiss complaint paragraph 8(h) as to Martin Nelson.

7. Rick Ferguson – February 11, 1993

a. Facts

Complaint paragraph 8(n) alleges that on February 11 AutoZone, by DC Manager Rick Ferguson, "promulgated a rule which prohibited employees from discussing the Union during working time." Several employees, including Reuben Rice, testified in support. Dennis Roberts and Rick Ferguson testified for AutoZone's denial of a violation.

Several of the central facts are not in dispute. All agree that the morning of Thursday, February 11, several members of the Union's organizing committee, including Reuben Rice, approached Ferguson and Roberts in the upstairs conference room. Rice read (2:122, 235, 274; 3:461, 495; 5:936) a short handwritten note (CPX 3) which, in essence, protests a discriminatory practice by AutoZone of allowing antiunion employees, such as Debra Phillips, to walk around during work time talking antiunion, and interrupting others at work (2:255), while prohibiting union supporters from campaigning for the Union during work time. Ferguson said he was unaware that was occurring and that he would put a stop to employees talking either for or against the Union during working time. (3:462, 496; 4:864). Ferguson recalls that he simply said he would handle the situation. (5:936).

After lunch that same day all employees were assembled and Ferguson told them that henceforth there would be no talking for or against the Union during working time, that it was hampering production, and that violators would be subject to discipline up to and including discharge. (2:122-123, 256; 3:462). Stanley Phillip Wilson

testified that Ferguson made it clear that employees could discuss union or anything else during their personal time at breaks, lunch, and before or after work. Wilson testified that this satisfied the union supporters because it stopped the antiunion supporters from walking around talking against the Union. (2:158). Rice, too, testified that he was satisfied with Ferguson's presentation to the assembled employees. (3:497). Although the accounts by Roberts (4:864-865) and Ferguson (5:936-937) do not include the warning of discipline for any violation, I find that such warning was given.

Company policy, as Vice President Roberts acknowledges, has been to permit employees to carry on conversations during work so long as their talking does not interfere with the work to be done. (4:865). Robin Delk so confirms. (3:354). The promulgation by Ferguson to the assembled warehouse, therefore, was not a change in policy, for AutoZone's policy has always been to restrict talking once it reaches the point of interfering with production. (4:865). There was no evidence here that merely talking about issues in the organizing campaign, during the critical period, interfered with production or did so any more than talking about the weather, sports, politics, or a variety of other topics all of which are permitted until the point production is interrupted.

b. Discussion

Citing ***Visador Co.***, 303 NLRB 1039, 1041-1042 (1991), the General Counsel argues that an employer may not prohibit only union discussion, even by forbidding both

for and against, while allowing employees to talk about anything else. ***Visador*** stands for the proposition that the Section 7 right to discuss union topics in an organizing campaign may not be prohibited while permitting employees to discuss, during working time, virtually all other topics. The complaint does not allege against AutoZone's concern about employees leaving their work stations without authorization during working time. Instead, the General Counsel attacks only the prohibition which amounts to a gag rule on discussion of the Union (pro or con) while permitting employees, during working time, to discuss practically any other topic.

Unlike ***Adco Electric,*** 307 NLRB 1113, 1117-1118 (1992), cited by AutoZone, there is no showing here that talking about the Union (as distinguished from antiunion employees leaving their work stations and going to employees at other work stations), ever reached the point of interfering with production. Indeed, Ferguson's account of his February 11 pronouncement conveniently omits the gag rule, while prohibiting roaming during work time or stopping "to put information together" rather than working. (5:937). Roberts concedes that Ferguson was to prohibit any discussion of the Union during work time. (4:865).

AutoZone defends on the basis that, in effect, any cases outlawing gag rules are misapplied here because AutoZone ordered only what the Union (that is, the Union's organizing committee) requested, citing ***Manchester Health Center v. NLRB,*** 861 F.2d 50, 129 LRRM 2849 (2d Cir. 1988). ***Manchester*** is inapposite. There is no statutory representative here with bargaining authority to restrict employees' Section 7 rights, nor was there here, as

there, a bitter and divisive strike. Nor was there here, as already noted, any evidence that mere talking about the Union during work interfered with work at all and certainly not any more than talking about fishing, football, the weather, or any other nonwork topic. Finally, the employees here asked for equal time, and complained about the antiunion roamers. That Reuben Rice and other employees may have acquiesced in a pronouncement which barred all talk, pro or con, about the Union during work time does not override the statute.

Finding DC Manager Ferguson's February 11 promulgation to be a gag rule unnecessarily restrictive, and therefore unlawful under Section 8(a)(1) of the Act, I shall order AutoZone to rescind it. ***Willamette Industries,*** 306 NLRB 1010 fn. 2, 1017 (1992); ***Emergency One,*** 306 NLRB 800, 806 (1992).

8. Timothy Schlichting – February 15, 18, 1993

a. Facts

Complaint paragraph 8(l) alleges that on February 5 AutoZone, by Supervisor Tim Schlichting, "threathened employees with transfer if they selected the Union as their collective-bargaining representative." Paragraph 8(m) alleges that 10 days later, on February 15, Schlichting threatened employees "with discharge if they utilized Board processes." Stanley Phillip Wilson testified in support of the allegations, with Schlichting opposing.

As noted earlier, Stanley Phillip Wilson was fired September 13, 1993. Later I discuss the allegation respecting his discharge. During the Union's organizing campaign Wilson worked in the Returns department, under

Supervisor Timothy Schlichting, performing such duties as reboxing repaired merchandise for resale. (2:117; 4:611-612). He also assisted in various other duties, such as separating salvageable antifreeze, brake fluid, liquid cleaners, and other chemicals (2:117-118, 137; 4:612-613) and scanning (2:167; 4:614-615). Jeananne Cole was the line leader [admitted statutory supervisor] who was Wilson's immediate superior. (2:148-149; 4:619-620, 740). Wilson openly and vigorously supported the Union. He began wearing a union pin on January 6. (2:118-119). His name appears at number 11 on the list of 32 members of the organizing committee, the list being attached to the Union's transmittal letter of February 1 to AutoZone. (GCX 4). He was one of the committee persons present when Reuben Rice protested to Ferguson and Roberts on February 11, in the conference room, that the Union supporters could not campaign on work time but antiunion employees could. (2:122, 156). Schlichting acknowledges his awareness of Wilson's open position of union support. (4:613-614, 670).

The scanning computer is similar in appearance to a supermarket cash register and hand-held infrared scanning gun. Operation of the scanning gun electronically records, on the computer, the product number of damaged merchandise which AutoZone's retail stores have returned to the warehouse. When the gun scans the product number, the computer electronically credits the retail store for the returned product. (2:158; 4:616-617). About 5 feet from Wilson's (primary) work station, and separated by a conveyor belt, is a scanning machine which normally was operated by Missy Riley. (2:159; 4:615). Wilson was cross trained to operate this scanning equipment, and at

various times did operate it and others. (2:167; 4:615, 623-624).

On February 5 (2:164), a Friday, Missy Riley was not at work, having quit AutoZone for other employment. (2:124; 4:614). Wilson testified that on this day Schlichting told him that he would have to do Riley's scanning, as well as his regular reboxing work, for about 2 weeks while AutoZone found a replacement. (2:124, 160, 163, 164, 170). Schlichting testified that he discussed the matter with Wilson and that Wilson willingly agreed to help out. (4:615). Schlichting asserts that, because the winter season has fewer returns of damaged merchandise, Wilson's regular work was slow at the time. (4:614, 639-642). Schlichting and Jeananne Cole figured that there would be only a 2-week need for Wilson to cover the extra work (4:619-620). Wilson acknowledges that at the time of the additional assignment, both Schlichting and Cole told him that in their opinion Wilson could do both jobs because the work stations were next to each other. (2:162). Wilson testified that, at the temporary assignment, he told Schlichting he did not want the assignment, but Schlichting assigned him the extra duty anyway. Wilson said he would try to do both jobs. He concedes that the additional assignment upset him. (2:170). According to Wilson (on cross examination), he expressed the view that Schlichting was making the assignment because Wilson was supporting the Union. (2:170).

Also according to Wilson, in making the assignment, Schlichting told him that if he did not perform both jobs he would be permanently replaced. (2:124, 172). However, in answers to questions which I asked in order to

clarify the situation, it is clear that the permanent replacement threat was not made on of [sic] February 5, but on February 18 in a different, and unalleged, incident. (2:172-173).

There is no complaint allegation of a discriminatory transfer, and the General Counsel announced that he was not seeking to amend the complaint in pursuing complaint paragraph 8(l). (2:127, 166-167). I note that complaint paragraph 8(l) does not allege "on or about" February 5; it alleges the specific date of February 5. AutoZone did not object to any reference to the unpleaded date of February 1. (Recall that the testimony, in answer to my questions, served to clarify Wilson's initial, 2:124, reference to the attributed threat). Even though I, rather than one of the parties asked the questions, AutoZone should have objected to evidence of any incident on February 18 as not being material because outside the pleadings. I therefore shall summarize the incident.

Inspecting his notes, Wilson testified (when AutoZone asked about the replacement threat attributed to Schlichting at the February assignment) that the threat occurred in these circumstances. Supervisor Ralph Lozipone (who, Wilson thinks, possibly was an Assistant DC Manager) came by and instructed Wilson to clean up his [regular] area. Wilson told Lozipone that he would clean as much as he could but he had to do the scanning job, too. After Lozipone then conferred with Schlichting, Schlichting told Wilson that if he did not do both jobs he would be permanently replaced. (2:172-174).

Schlichting testified that toward the end of the 2 weeks (Thursday, February 18, would be the last day of the 2 weeks), he went to see Wilson because Wilson's regular work was falling behind. After he told Wilson that he thought Wilson could handle both jobs, Wilson said it was too much work. Schlichting then offered Wilson the option of working [transferring, presumably] in another area of the warehouse. Taking offense at that, apparently because he was comfortable with his regular job, Wilson said he did not want to change, that he would stay. The following Monday Schlichting assigned Elaine Whitlock for training on the scanner. Whitlock, who had been on light duty from a back injury, had just received a medical release to return to full duty. (4:622-623).

Turn now to the second allegation. Wilson testified that on February 12, a Friday, he asked Schlichting why he was not being permitted to attend the "antiunion" meetings AutoZone was conducting. Schlichting said he would check with Ferguson. On Monday, February 15, Schlichting told Wilson that Ferguson said Wilson could not attend the meetings because his mind was made up in view of his open support of the Union. Wilson said the exclusion left him feeling like an outcast and he felt like filing a charge of discrimination. "Go ahead," Schlichting replied, "it won't do no good here in Greenville. It did not do any good in Phoenix and by the way, after this election you will be out of a job permanently." [Rather than the run-on sentence reflected in the transcript, I would record the "And by the way . . . " as the ending sentence.] (2:125-126, 151-152, 168-169).

Schlichting's account is generally consistent with Wilson's, although Schlichting asserts, after saying the

Phoenix charge had not been substantiated, and doubted that it would be successful in Greenville, that Wilson said he would file one anyway. To this Schlichting told him to do what he had to do. Schlichting denies saying that after the election Wilson would be out of a job permanently. (4:624-627, 643-644).

b. Discussion

Although I credit Wilson in one or two instances where he supports the testimony of others, I generally do not believe him. Similarly I generally have not credited Schlichting. Even though Wilson's testimonial trip to the February 18 attributed threat is both tortuous and torturous, I credit his description of Schlichting's return to tell him that he would have to do both jobs (meaning his regular job as well as the scanning job) or he would be permanently replaced. His version is more natural than Schlichting's, whose account seems disconnected. That is, Schlichting began the conversation on the issue of Wilson's falling behind on his regular job of reboxing damaged/repaired merchandise. Nothing was resolved about that when Wilson said he would stay rather than transfer. I credit Wilson's version.

Having credited Wilson's version, I shall dismiss complaint paragraph 8(l). The credited version describes a February 18 threat that Wilson had better do his regular job, as well as the temporary one, or else. First, there is no complaint allegation covering the incident. Second, in the context of events, there is nothing unlawful with that statement. Third, the statement is not directly related to a job transfer (the February 5 allegation) in any event.

Actually, complaint paragraph 8(l), the February 5 allegation, appears to be based, somehow, on Schlichting's trial version of the (February 18) incident, a version I have not credited, rather than on any version described by Wilson.

Respecting the second allegation, the supposed February 15 threat, I do not credit Wilson. I find that he, admittedly upset over the scanning work which he did not want, gratuitously added to Schlichting's response about a charge in Phoenix being unsuccessful. Aside from being all too convenient, the addition has an unnatural fit to Schlichting's statement. By contrast, Schlichting's threat some 3 days later, as I detailed above, had a natural ring (and Supervisor Lozipone did not take the stand to dispute Wilson's version), and I credited it (although I shall dismiss the allegation). I shall dismiss complaint paragraph 8(m).

9. Timothy Schlichting – Mid-February 1993

a. Facts

Marvin Holmes testified for the General Counsel in support of the paragraph 8(h) allegation that Timothy Schlichting, at mid-February 1993, threatened employees with unspecified reprisals if they voted-in the Union.

After a 10-year employment with AutoZone, Marvin Holmes left AutoZone in September 1993. (3:437). He had worked in the maintenance department, the name of which was changed to Housekeeping in August 1993. (3:438, 450-451). Holmes was active in the 1993 campaign or behalf of the Union, being a member of the organizing committee and wearing a Union pin on his shirt at work.

He began wearing the Union pin in January. Timothy Schlichting was his supervisor. (3:438-439). In a departmental meeting, about February, with Holmes and some 15 other employees present, Schlichting told the group that it would be the wrong thing to bring in the Union, and that if the employees voted for the Union they would regret it. He did not say in what way they would regret it. (3:339-340, 343-344). None of the other 15 employees present testified in corroboration.

Acknowledging he made a reference in a departmental meeting during the campaign to employees being sorry, Schlichting testified that he said this as part of a statement that the employees would be sorry because of all the "things they would have to go through in order to get this process through. . . . " (4:628, 662-663). Schlichting's account, which is rather disjointed, appears to be that he told the group something on the order that they would be sorry they had given the Union enough support to file a petition, for before the matter was over they would have to attend meetings about the union campaign and listen to speeches on the subject. In short, the campaign process would be a big hassle, and they would be sorry because of the stress the campaign would create.

b. Discussion

Crediting Holmes' version rather than the strained and disjointed version of Schlichting, I find that the "regret" Schlichting predicted related to voting for the Union, not to any campaign stress. Equating a vote for the Union to regret, however, is ambiguous. Employees could regret the dues they would have to pay, or a strike

they would have to support or endure. The statement does not necessarily threaten job discrimination if the employees select the Union as their bargaining representative. I shall dismiss complaint 8(h) in its entirety.

10. J.R. Hyde III – February 19, 1993

a. Facts

Complaint paragraph 8(j) alleges that in mid-February AutoZone by its chairman, J.R. Hyde, "threatened employees with closure" of the Greenville facility if they voted in the Union.

Complaint paragraph 8(k) alleges that in mid-February AutoZone, by Chairman J.R. Hyde, "threatened employees with loss of jobs" if they vote – in the Union.

The subjects of the Government's attack here are portions of a speech (GCX 3) which AutoZone chairman, J.R. Hyde III, gave to the Greenville employees on Friday, February 19. The General Counsel designates the last paragraph on page 8 as the target of complaint paragraph 8(j), and the middle paragraph on page 7 as the focus of complaint paragraph 8(k). (2:325-326). Before quoting the paragraphs, a brief summary of the speech is in order. The double-spaced, and moderately large type, covers about 11 letter-size pages (a short first page and less than three lines on page 12). Hyde quickly emphasizes that the election is a serious matter and that AutoZone is "totally opposed to the Teamsters getting in here." Hyde reports that although AutoZone is completely nonunion, Hyde has had much experience with the Teamsters in his many years with Malone & Hyde. [Recall from my earlier

description of AutoZone's business history that AutoZone formerly was a division of Malone & Hyde.] The experience was bad, and in every instance where the Teamsters made the company lock horns with them, it was "the employees who suffered the most." (GCX 3 at 2).

This is why, Hyde explains, AutoZone has spent so much time in meetings with the employees during the last few weeks. Hyde soon begins talking about the Union and strikes, and that the record of the Teamsters is enough to scare anyone. Based on his personal experience, Hyde asserts that the Teamsters strike *"100% of the time."* (GCX 3 at 6). Considering that record, Hyde states he would be very concerned about what would happen at Greenville after March 5 if the Union were to win. "I do not want any of you or any of us to run the risk of the Teamsters making this DC number 4 [Hyde had described strikes at three other DCs, Sikeston (Missouri), Memphis, and Nashville] on their strike list against us. That's one of the biggest reasons we are opposed to their getting in." (GCX 3 at 7).

Hyde then reached the middle paragraph on page 7, the subject of complaint paragraph 8(k). The text reads:

> Nobody wins a strike. At each of the cases I mentioned, both the company and the Teamsters survived the strike and are still around. Nashville is still operating today full bore. So is Sikeston and so is Memphis. The only part of the equation not still there are the employees who allowed the Teamsters to call them out on strike. As Rick and Dennis told you, the 185 strikers at our Nashville warehouse who walked

> out on an illegal wildcat strike were all fired. Those 185 employees did *not* get to vote. Not one of them has ever gotten his job back. The strikers in Memphis and Sikeston were all replaced, and none of them have gotten their jobs back to this day. In fact, there is no union today in the Nashville DC, the Sikeston DC, or the Memphis DC.

From there through the last paragraph on page 8 ("I know . . . – the focus of complaint paragraph 8j), the test reads:

> The Teamsters' record with me and your management team is just about as bad as you can get. Maybe it's because I take a no-nonsense business approach to dealing with them, and I never suck up to them or try to become pals with the Teamster bosses. I've always dealt fairly and legally with them, but neither do I quake and shake when the word "union" is mentioned.
>
> I don't make many bets but I will bet you this – Mr. Barry, Mr. Wood and Local 28 have never dealt with anyone like us. If the Teamsters want to play hardball, we can do the same. I doubt very seriously that they have ever tried to change a uniform policy with a company whose Chairman and CEO wears the same uniform.
>
> Don't misunderstand: AutoZone and I don't want a strike; we don't want trouble. But, if the Teamsters make demands on us which I am unwilling to accept, I will say, "NO." I guarantee you and Mr. Barry that if I say, "NO," I will mean it and I am ready. If you or he believe for one second that a picket line or a strike at the DC will make me give in one inch – you're *dead*

> wrong. And if the organizers think a strike or picket, anywhere else – including the stores – will make me give in one inch – then they are dead wrong.
>
> I know, as sure as I'm standing here, that if I let anyone – here or anywhere else in this company – think the Teamsters union is in charge, I might as well close the doors, put a lock on the gate, and throw away the key. I will not let the Teamsters, with their record and their own agenda, destroy what you and I have built.

b. Discussion

When an employer conveys a message that in strikes employees may lose their jobs, the employer must explain. As the Board wrote in ***Baddour,*** 303 NLRB 275 (1991):

> The Board in ***Larson Tool & Stamping Co.,*** 296 NLRB 895 (1989), made it clear that employers cannot tell employees without explanation that they would close their jobs as a consequence of a strike or permanent replacement.[3] The phrase "lose your job" conveys to the ordinary employee the clear message that employment will be terminated.

Applying that principle here, I conclude that AutoZone has failed the test. In the "Nobody wins a strike" paragraph, the penultimate sentence refers to strikers at

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[3] For example, the Respondent could have explained that the names of replaced employees would be placed on a preferential hiring list and that they would be recalled if a permanent replacement left the employ of the Respondent.

Memphis and Sikeston who "were all replaced," with none getting their "jobs back to this day." The vice with the statement is that it equates striker replacement with loss of jobs. This thought is reinforced by two of the three sentences which precede it, referring to the "fired" 185 wildcat strikers and the fact that not one "has ever gotten his job back." Thus, juxtaposing a statement about strikers being "fired" in an illegal strike, combined with the sentence that not one has ever gotten his job back, creates a liquefied fire which spills over to the succeeding sentence ("The strikers in Memphis . . . to this day.") drenching it.

The statement, by itself, about fired illegal strikers never getting their jobs back is lawful. But splashing that verbal napalm onto the succeeding sentence forms an incendiary mixture which, even if (contrary to fact) the succeeding sentence were lawful standing alone, unlawfully threatens loss of jobs for strikers who participate in lawful strikes. With Hyde's earlier reference to his personal experience being that the Teamsters strike "100% of the time," the overall message is clear – a successful vote for the Union means that there will be a strike, that the strikers will be replaced, and that the replaced strikers will lose their jobs at AutoZone. I find that the message threatens loss of jobs in violation of Section 8(a)(1) of the Act, as alleged by complaint paragraph 8(k).

Respecting the remaining portion in issue, the General Counsel attacks the final paragraph, "I know . . . destroy what you and I have built." Citing ***Almet,*** 305 NLRB 626 (1991), enfd. 987 F.2d 445, 142 LRRM 2743, 2745, 2748 (7th Cir. 1993), the General Counsel argues

that the paragraph fails to define the reference to the Union's being in charge, and fails to explain why AutoZone would close the doors, lock the gate, and throw away the key rather then simply reject the Union's contract demands. Thus, the Government argues, AutoZone's message unlawfully threatens to retaliate by closing the plant if the Union is selected.

Arguing that it is free to express its views so long as there is no threat of reprisal, AutoZone relies on, for example, ***Emory Nursing Home,*** 260 NLRB 540, 554 (1982), that a mere reference by the CEO to closure is protected speech because not a threat to close. There the CEO also told the employees, before and after reading his speech, that he did not intend to threaten or coerce anyone. ***Emory,*** id. Hyde gave no such assurance in his speech.

Almet involved a statement in which the employer's chairman, Richard Greim, stated:

> You all know what kind of man I am and what I stand for. You also know how I feel about the unions. I have never lied to you before, and I'm not going to start now. As I stand here before you I'm here to tell you that I will never agree to any demands that I believe are not in the best interest of this company – and if I have to shut down this plant to maintain those principles – I will shut it down and go out of business.

The ***Almet*** statement is a direct threat of shutting down and going out of business. Greim made no effort to describe the objective facts which would cause that drastic event.

Although CEO Hyde does not flatly state he will close the doors, his statement conveys that message. His message is that if the Union gets in, and secures such favorable contract terms [to which, of course, AutoZone would have to agree], so that someone at AutoZone could "think" that the Union was in charge, then Hyde "might as well" close the Greenville plant. And he would do so because "I will not let the Teamsters, with their record and their own agenda, destroy what you and I have built." That is, Hyde would close the plant before he sees it destroy the nonunion operation "that you and I have built." That, I find, is the message. The message threatens to retaliate for a Union victory by closing the plant. The retaliation threat violates Section 8(a)(1) of the Act as alleged by complaint paragraph 8(j).

11. Barbara Cunningham; Marshall Hurley – Mid-February 1993

a. Facts

Complaint paragraph 8(o) alleges that sometime from January 7 through March 5 Supervisors Barbara Cunningham and Marshall Hurley instructed employees to refrain from discussing the Union. I describe this as a mid-February allegation because the incidents appear to have followed Ferguson's February 11 pronouncement.

Reuben Rice testified that during a sectional meeting Cunningham stated that if anyone was caught talking about the Union, either for or against, he would be terminated, and for the employees to keep their "mouths closed and just keep working;" (3:459) "just nobody talk about it and, you know, get your job done and stay busy

and, you know, do your job." (3:492). Cunningham testified that she never said that to "Ms. Delk" or "Ms. McGinnis." (4:783). [In fairness to witness Cunningham, I note that the questions specified Delk and McGinnis, and did not focus on a sectional meeting.] I credit Reuben Rice.

Robin Delk testified that as she was standing in the restroom line and talking to those in line, Supervisor Marshall Hurley walked by and told them they did not need to be talking about the Union. Delk does not recall what she and the employees were talking about, but does recall it was not about the Union. (3:353, 378). Supervisor Marshall Hurley did not testify. I credit Delk.

b. Discussion

Because Rice and Delk and Delk can do not better than to place the incidents as being between the petition and the election, and because the statements conform to the gag rule which DC Manager Ferguson imposed on February 11, I find that the incidents occurred at mid-February, after Ferguson's February 11 pronouncement.

The two incidents here are merely evidence that supervision implemented DC Manager Ferguson's February 11 pronouncement. As such, the conduct violates Section 8(a)(1) of the Act, as alleged.

12. Timothy Schlichting – mid-February 1993

a. Facts

Complaint paragraph 8(g) alleges that AutoZone, through Supervisor Timothy Schlichting, on two occasions from late January to early February, "promulgated a discriminatory rule prohibiting pro-union employees from conversing about the Union."

The parties brief an incident in which Andrews, while cleaning lavatories in a women's restroom, stopped two female employees who came in to use the facility, and began discussing the Union's health benefits, an issue in the union campaign. Andrews concedes that he prevented (delayed) the two women from returning to their jobs. Schlichting thereafter told Andrews he was not to discuss union issues on company time. (2:276-277, 2:293-297).

Denying that he mentioned the Union to Andrews, Schlichting asserts that he told Andrews he was there to do a job, that while he could mention, for example, a football game, Andrews was not to detain employees from returning to work. Schlichting did not issue Andrews a written warning or even memorialize the event for Andrews' personnel file. Schlichting never spoke with the two female employees, hearing about the incident from another employee, Debra Shue. (4:630-635, 671-673).

b. Discussion

Crediting Andrews, I find that Schlichting's focus was not on production, or on the awkwardness of AutoZone's procedure of not requiring a male housekeeping employee to block the entrance door when he is cleaning a women's restroom, or even on detaining the women for discussion, but it was the topic of discussion – the Union – which caused Schlichting to counsel Andrews.

Complaint paragraph 8(g) actually alleges that there were 'two occasions" when Schlichting engaged in this conduct. The General Counsel briefs only the foregoing incident, involving James Andrews. AutoZone also briefs as to testimony by Stanley Phillip Wilson. Wilson testified that, a couple of days before the February 11 meeting with Ferguson, Schlichting told him that he would be discharged if he were caught discussing union on the job. (2:156). Schlichting does not address this. I credit Wilson because his version is consistent with the committee's purpose in going to Ferguson on February 11.

I find that the conduct of Schlichting violates Section 8(a)(1), as alleged.

13. Jerome Flowers – February 24, 1993

a. Facts

Complaint paragraph 8(i) alleges that of February 24 AutoZone, through Supervisor Jerome Flowers, "threatened employees with discharge because" they supported the Union. Karen Holcombe testified in support of the allegation, with Jerome Flowers denying.

Karen Holcombe worked for AutoZone a year, leaving the Friday before she testified. (3:401, 407). Beginning as an order selector, Holcombe later moved to a checker position. Jerome Flowers was her supervisor. A cousin of Robin Delk [an open supporter of the Union], Holcombe began wearing a union pin on her clothing about mid-January. Her open support of the Union was common knowledge in the warehouse during late January 1993. (3:401-402, 407-408).

Holcombe testified that one day in late February, as Holcombe and Flowers met in the warehouse, Flowers initiated a conversation. Other than the fact Flowers spoke first, Holcombe recalls very little of what was said. She does recall that Flowers said AutoZone was bringing in 52 replacement workers from Memphis, and if Holcombe voted "Yes," one of the 52 would replace her. (3:403). On cross examination Holcombe recalls Flowers' statement as being that if she voted "Yes" for the Teamsters she would lose her job. (3:409-410). Either that day or later that week, she testified, Holcombe removed her union pin and went to Personnel Manager Jim Wartinger and told him that she no longer was a supporter of the Union. He asked her why not. She answered that it was because she wanted to keep her job. She did not think about Flowers' remark and so did not mention that to Wartinger. Wartinger said he would try to get her back into the antiunion meetings that AutoZone was conducting. She did attended [sic] two of AutoZone's "educational" or "antiunion" meetings after that and she never again wore the union pin before the election. At some point the 52 employees showed up and began working

alongside the other employees. (3:403-404, 419, 422, 429, 434).

On cross examination Holcombe confirmed the earlier implication by saying that the 52 replacements had not yet arrived when she and Flowers spoke. (3:410). However, in her pretrial affidavit Holcombe reported that the 52 employees had arrived and that when she asked Flowers about their presence Flowers said that the 52 replacement workers from the Memphis headquarters and that one would replace her if she voted "Yes." (3:411, 413). Holcombe, who had difficulty remembering details, then again answered that the 52 replacements were not present in the warehouse. (3:413). To show that Holcombe's testimony flowed from a bias against Flowers, AutoZone introduced a February 8, 1993 "second written warning" (RX 9) for pulling wrong parts. The warning states that continued errors could lead to termination. Holcombe verifies the warning (after first not recalling any prior discipline), and does not recall any previous warning. She denies that the warning made her angry toward Flowers because, as she describes, she is "easy going" and because she in fact made the mistakes. She was not concerned about losing her job, but she was concerned, she testified, about being replaced. (3:414-419).

To offset any bias effect of the February 8 warning, the Union offered Flowers' performance review (CPX 2) of Holcombe. (3:426). Although the form shows a typed review date of December 22, 1992, with an effective date for her new rate (from $6.25 to $6.50, 3:423) of January 3, 1993, Holcombe testified that the review occurred in late January, identifying her dated signature of January 28

and Flowers' dated signature of January 25. (3:425). In the review Flowers records that Holcombe does an excellent job in her assigned tasks. For improvement, Flowers encourages Holcombe to initiate action on her own. Overall he rated Holcombe as "Achieves Requirement." (CPX 2).

In very brief testimony, Supervisor Flowers asserts that he had received daily training on what not to say [TIPS]. He denies ever threatening Holcombe in any way, and denies telling Holcombe that she would be replaced by an outside employee. (4:689).

b. Discussion

Karen Holcombe testified with such vagueness and contradiction that I have insufficient confidence in what she asserts to find merit in the complaint allegation. The denials by Flowers are brief, but direct. Not crediting Holcombe, I shall dismiss complaint paragraph 8(i).

14. Barbara Cunningham – March 5, 1993

a. Facts

Complaint paragraph 8(c) alleges that AutoZone violated Section 8(a)(1) of the Act on March 5 when Barbara Cunningham, who became assistant DC manager about March 1, promised employees a "pay raise" if they "voted against" representation by the Union. Complaint paragraph 8(r) is a duplicate allegation, phrased as a promise of a "wage increase" if employees "rejected the Union as their bargaining representative." Both allegations cover

the same incident, with Robin Delk testifying for the General Counsel, and Barbara Cunningham opposing. I shall dismiss paragraph 8(r) as an unnecessary duplicate of paragraph 8(c).

Robin Delk testified that she voted during the afternoon session (1 p.m. to 2:30 p.m., recall) at the March 5 election. (3:391). As summarized earlier, Delk worked much of her nearly 2-year employment under the supervision of Barbara Cunningham. (3:349, 352). She could recognize Cunningham's voice. (3:388). During the voting period, but before she voted, Delk was working in an aisle next to the oil aisle. Although stacked merchandise blocked her full view of the oil aisle, Delk heard Cunningham speak. (3:356, 379, 386-388, 391-393). Presumably Cunningham was speaking to one or more employees, although Delk, who could see only the top of Cunningham's head, could not see the employees. (3:387). Delk does not recall hearing any of the employees speak. (3:388).

On this occasion, Delk testified, Delk heard Cunningham say that when the No vote was brought through, the warehouse would receive a (pay) raise to $9.00. (3:356, 389).

Shortly before election day Vice President Dennis Roberts (4:862, 888) and DC Manager Rick Ferguson (5:907-908) instructed supervisors that on election day they were not to speak to more than one employee in a conversation, and if a second employee came over to join, the supervisor was to walk away. Assistant DC Manager Cunningham testified that she was so instructed. (4:780). Cunningham denies that she had such a conversation as

Delk attributes, that she made such a statement, or that she even had a basis for making such a statement. (4:780-782).

Reference to no "basis" for making the statement ushered in evidence about the pay range for the progression pay scale. A chart (GCX 6) in evidence reflects that the top rate of the 2-year pay progression at Greenville remains at $7.75 per hour. (4:820). Cunningham testified, in effect, that she was outside the loop of any discussion of wage increases for 1993 (4:799, 804), and that she did not know what the other DCs were paying (4:806-807).

Vice President Roberts testified that the weighted pay increase percentages implemented in January 1993 were 3.30 at Memphis, 7.64 at Lafayette, 9.67 at Phoenix, and 10.24 at San Antonio. (4:825-826; RX 12). Even assuming that had the pay increase been implemented at Greenville, and that it would have been 10 percent, the top rate for the progression categories would have increased by some 78 cents to $8.53 per hour. A raise to $9.00 per hour would have been an increase exceeding 16 percent. Although Roberts testified that the wage survey at Phoenix indicated that the increase at Greenville would have to exceed 5 percent (4:841, 885), no figure has been finalized. (4:885). Of course, this does not mean that Cunningham never heard any rumors. Indeed, instead of rumors, the words of Vice President Roberts himself show a basis for Cunningham to have referred to $9 an hour. Thus, in the tape-recorded question and answer session following the January 22 speech by Ferguson/ Roberts, it is Roberts, responding to a question, who states that the raises implemented just days earlier at the other locations "averaged between 12 to 15 percent."

(CPX 1 at 8). Had a 15 percent increase been implemented at Greenville, the $7.75 top rate would have been raised to $8.91. Thus, any statement by Cunningham about a raise to $9 would have been only slightly more, in percentage, than the percentage Roberts himself said had already been implemented at an unspecified distribution center.

b. Discussion

The fact that no one in Cunningham's assumed audience spoke is puzzling. Surely the topic was of interest to whoever was there. For that matter, there is no evidence of the identity of the person or persons who normally would have been working in the area and who might have been there with Cunningham. In view of all the questions about the incident, I am not persuaded that Delk heard Cunningham speak on this occasion. Accordingly, I shall dismiss complaint paragraph 8(c).

15. Rick Ferguson – March 16, 1993

a. Facts

Complaint paragraph 8(b) alleges that on March 16 AutoZone, by DC Manager Rick Ferguson, threatened to withhold pay raises due its employees because of the employees' support for the Union. AutoZone denies. (The other date, January 13, in this paragraph, specifying Barbara Cunningham, is summarized earlier.) For support the General Counsel relies (2:326; Brief at 8-9) on the prepared text (GCX 14) of a speech delivered March 16 by

DC Manager Ferguson to small groups of assembled employees. (1:19; 5:904, 924-925, 979-980).

Ferguson's March 16 prepared text is short, about one and one half pages of double-spaced text, of moderately large type. It reads (GCX 14):

> Good afternoon. I don't know whether the union committee people have told you by now, but the Teamsters union has filed objections to our election with the Labor Board in Winston-Salem. Unfortunately, this means that the results of your election victory will not be officially certified until these objections are resolved.
>
> I want to repeat how proud I am of you and how appreciative I am of what you did when you voted this union down. It's a crying shame that even though you voted overwhelmingly against the Teamsters, Mr. Barry, Mr. Wood and a few other people seem determined to try to ignore your wishes.
>
> The filing of objections by a union after an election defeat is a common tactic. The [sic] did it to us in Phoenix after that election, but we were able to get them dismissed there. We strongly believe that these objections are groundless, and we will do everything in our power to contest them, and to uphold your vote. We believe we did nothing wrong in the course of the campaign, and that – contrary to what the union may think – the only reason you voted down the Teamsters by such a wide margin was that we simply shared the truth with you about them.
>
> In the meantime, however, the Labor Board will conduct an investigation of the union's objections. The union may try to get statements from

> you to back up their claims. There is even the possibility that a hearing may be held to discuss the issues. All of this may take some time, and unfortunately, while these legal proceedings are pending, we still have many of the same legal restrictions upon us as to what we can say or do with respect to any changes in the pay, benefits, or other terms of employment that we had before the vote. As we have said before, we do not want to create the impression we are trying to unlawfully interfere with the outcome of this issue before it's officially over. We are sorry we can't say more, but we intend to obey the law.
>
> We hope to have all of this behind us as soon as possible. In the meantime, we will keep you posted.

Janette M. Hanson worked for AutoZone from May 1992 until her July 8, 1993 resignation. (1:13, 32). During 1993 she worked as an order selector. She was an early supporter of the Union, and her support soon was open, including wearing a union pin and assisting in handbilling. (1:14, 33-35, 46). Of the 32 employees names on the list of the employee organizing committee mailed to AutoZone with the Union's letter (GCX 4) of February 1, Hanson's name heads the list.

According to Hanson, as Ferguson completed reading from the prepared text on March 16, in which he told the employees AutoZone "could not give us a raise," he looked out at the group and "he told everybody if they wanted to know what happened to their raises to ask the people on the Committee." (1:19-20).

Testifying that he was aware employees were recording the speeches management officials gave to

employees, Ferguson denies ever telling employees that if they want to know about their raises to ask the Union committee. (5:905-906). Although he does not believe there were questions and answers following the March 16 speech, Ferguson concedes there could have been a conversation with him after the meeting. (5973-974). Ferguson names several of the Government's witnesses, such as Robin Delk, Reuben Rice, Jackie McGinnis, and other as employees who would have been present for the speech. (5:982-983). None of these other witnesses addressed the statement which Hanson attributes to Ferguson.

As I noted much earlier, following the Ferguson/Roberts speech of January 22 (GCX 2), a question and answer session followed. That session, also tape recorded by employees, is transcribed on some 28 pages of an exhibit in evidence (CPX 1). Although Roberts did most of the speaking during that lengthy informal session, there were several questions about the pay raise (CPX 1 at 7-8, 16-20), and at no point did either Roberts or Ferguson refer employees to the Union's organizing committee.

b. Discussion

I do not credit Hanson's account that DC Manager Ferguson, following his prepared text speech on March 16, looked out at the employees and told them (presumably without benefit of a question) that if the employees wanted to know what happened to their raises, to ask the people on the Union committee. First, I note that Hanson quotes Ferguson as stating, in the prepared text, that AutoZone could not give employees a raise, yet in the

stipulated text the pay-raise topic is not mentioned. Second, none of the employees, including none of the Government's witnesses, support Hanson's account. Thus, from all of the small group meetings held (and there were 15 per speech), not one employee supports Hanson. Third, Hanson's account is inconsistent with management's responses to questions at a lengthy, informal session on January 22.

Turn now to the prepared text read by Ferguson. The General Counsel attacks the penultimate paragraph, which begins "In the meantime . . . " (2:326) and, specifically, the clause reading "while these legal proceedings are pending, we still have many of the same legal restrictions upon us as to what we can say or do with respect to any changes in the pay, benefits, or other terms of employment that we had before the vote." (Brief at 8-9). The General Counsel argues that informing employees that "a pay raise cannot be distributed because of the employees' support for the Union and because the Union filed objections to conduct during the election is violative inasmuch as it places the onus upon the Union when the Union merely sought to protect the rights of employees." The General Counsel relies on ***Atlantic Forest Products,*** 282 NLRB 855, 857-859 (1987).

Unlike Vice President Roberts' remarks in the January 22 speech, where the pay raise was mentioned expressly, the Union's "poor timing" cited, and hope voice once the Union "is beaten" in the election (and I found a violation as alleged by complaint paragraph 8f), the statement here never mentions, expressly, the pay raise. Although Ferguson reports that the Union has filed objections, and that it is a "crying shame" in view of the

overwhelming vote, AutoZone believes the objections are groundless and will be dismissed as at Phoenix, and advises that the Board's processes may take time, the emphasis is on the legal proceedings. In that connection, the sentence in focus here about time, legal proceedings, same legal restrictions respecting any changes in pay, benefits, or other terms, does not expressly refer to the pay raise issue and says nothing about the Union.

The Government's position seeks to piggyback on the January 22 remarks in order to argue that the March 16 remarks should produce the same legal conclusion of unlawfulness. I shall dismiss this allegation. Having earlier dismissed the Barbara Cunningham portion, I now shall dismiss complaint paragraph 8(b) in its entirety.

F. Section 8(a)(3) Allegations

1. Withholding pay increase – January 22, 1993

a. Introduction

Complaint paragraph 9 alleges that AutoZone, "since on or about January 22, 1993, has withheld and continues to withhold scheduled pay increases due to its unit employees because the Union filed a representation petition." Paragraph 15 alleges that the paragraph 9 conduct violates Section 8(a)(3) of the Act. In its answer, AutoZone denies both allegations. I summarized most of the essential facts earlier when covering the Ferguson/Roberts speech of January 22.

AutoZone's position here is that there is no violation because the alleged pay increase was never scheduled; it had not been finalized before the Union filed its petition

in the representation case and, indeed, has never been finalized. The General Counsel argues that the question is not whether AutoZone had decided to grant an annual pay adjustment, for it had decided to do that. The only question not answered, not finalized, was the percentage, and then only in the sense that Roberts knew it would be greater than the 5 percent estimate which Roberts gave to employees in November and December 1992.

The record contains evidence about the history of AutoZone's annual adjustments at Greenville. Greenville did not open until October 1986. The first annual adjustment for Greenville was in late 1989, and made effective for late 1989. (4:818-820). The 3.5 percent adjustment is a total for all the pay scales, for an individual pay category could have a different percentage. (4:821). The adjustment made in late 1990 was less than 1 percent. (.9 percent; GCX 6; 4:820). In late 1991 AutoZone changed its adjustment policy from facility anniversary to January in order to put all DCs on the same annual timetable. Thus, the late 1991 adjustment at Greenville was postponed and made the 4.3 percent adjustment was made effective the first Sunday in January 1992. (4:820-821).

I need not dwell on the history. Roberts testified that there is no guarantee that a facility will receive an annual adjustment. (4:831). It is not an annual cost of living raise. (4:815). Whether one is given depends on the market in the area. All that is beside the point. Several facts here are clear. Vice President Roberts told some employees in late November 1992 that management "expected" that there would be an annual adjustment in the range of 4 percent to 5 percent, although that had not been confirmed. (4:835-836). In early December, Roberts testified, he

returned to Greenville and told all employees, in small groups, what he had told the others 2 weeks earlier (4:836-837, 885-886), that "our assumption was that there might be an annual increase" in the 4 percent to 5 percent range. (4:837). The question and answer session on January 22 reveals Roberts telling employees, when describing what he had told employees in December: that "we expected a 4 to 5 percent increase" (CPX 1 at 7); "We told you then that we *thought* it was going to be 4 to 5 percent" (CPX 1 at 19); "That's [answering question regarding 4 percent to 5 percent] what we told you in December, we thought it was going to be at that time." (CPX 1 at 20). As Roberts phrased it in the speech only minutes earlier on January 22, "the numbers were mentioned in December were a tentative forecast only." (GCX 2 at 7).

In his December talk to the employees, Roberts also told them that AutoZone was waiting for the result of a market analysis being done for the Phoenix area. (4:837). As I described earlier, when Roberts left Greenville that week to return to Memphis, he had received, the day of his departure, an advance copy of the Hay Group's Phoenix survey, dated December 15.

Roberts testified that the Hay Group's survey indicted to him that AutoZone was no longer competitive at Greenville, so he instructed Ferguson to begin a wage survey for the Greenville area. (4:838-839; 5:940). As I summarized in more detail earlier, the Hay Group's report plus the follow-up image survey at Greenville indicated to Roberts that the earlier estimate of 4 percent to 5 percent was "too low," and that the "increase" at Greenville would be greater than 4 percent or 5 percent.

(4:841, 845-846, 885). According to Roberts, he did not complete his analysis, not because the Union filed its petition [although that is the reason he gave employees on January 22. CPX 1 at 20.], but because, after consulting with AutoZone's attorneys, he believed it would have been unlawful to have implemented a pay increase at that time." (4:846, 884-885). His concern was over the legality, not because he lacked any market data to analyze. (4:846). As noted earlier, Greenville was not part of the recommendation package which he submitted to President Formanek the afternoon of January 11, and Roberts, as of the trial, still had not finalized his recommendation. The analysis would determine a percentage, either in advance, and then allocating it across the pay categories, or assign percentages by category first, with the result yielding an overall average percentage. (4:896-898).

b. Discussion

To the extent it is necessary at all to resolve credibility here, I do not credit Vice President Roberts. First, Roberts puts his knowledge of union organizing as of the Union's January 6 telegram (RX 13) demanding recognition. (4:854). The record persuades that he learned earlier. Ferguson testified that he learned in early December (2:98), and, as I summarized earlier, by mid-December he began a TIPS training program. Eloise Ruth testified that supervisor Barbara Cunningham told her in late November or early December that union organizing was occurring. (4:691). When the Union's demand telegram came, Ferguson called, not his ROM, his immediate superior, but Roberts "immediately." (5:938). This modification of

the chain of command implies that the alteration was prearranged to handle the union situation – an arrangement dating back, I find, to early December after Ferguson first learned.

Second, Roberts asserts that he gave the TIPS training, that it began after January 7 on an almost daily basis, and that he recalls no earlier TIPS training by someone else. (4:861-862, 88). Yet former supervisor Timothy Schlichting testified that Ferguson began the TIPS training a few days before Christmas. (4:610-611, 660, 665-666). Although Assistant DC Manager Cunningham testified that it was both Roberts and Ferguson (4:775), she gives no time frame. I find that Roberts was aware that Ferguson began the TIPS training in December. Indeed, Ferguson no doubt did so after, I find, reporting to Roberts that there was union organizing at Greenville.

Third, when Roberts told employees, during the tape-recorded question and answer session of January 22, that the pay increases effective that very day at the other DCs average from 12 percent to 15 percent (CPX 1 at 7-8), Roberts knew that was false because he prepared the package which he gave to AutoZone's president. It is true that some of the individual wage categories below the top (2 year) bracket enjoyed increases of that much and even up to 16 percent (mainly where classes 1, 2, and 3 were merged into a single wage rate, the result being a big, but one-time, increase for the employees in the lowest paid class). But Roberts also knew that the weighted averages were substantially less than that. The fact that they are substantially less means that most of the employees

received substantially less than the 12 percent to 15 percent increase which he told the Greenville employees was what the pay increases at the other DCs had averaged.

Moments earlier Roberts had referred to the "top bracket" when talking about the expected increase of 4 percent to 5 percent. Even if it could be said that Roberts was referring only to the top bracket when he later said that the increases at the other DCs varied across the board "but they averaged between twelve and fifteen percent," then his statement is true only as to a single instance, and that being only because the three classes of that bracket were merged into a single wage rate for 1993. That was at Phoenix. There, in the 2-year bracket, the old class 1 rate was 7.90, the class 2 rate 8.15, and the class 3 rate 8.20. When AutoZone eliminated classes, except for Memphis, that naturally means that those in class 1 enjoyed a big increase when the new 2-year rate became the rate for all in the 2-year, or top, bracket at 9.00. For the person or persons in the former class 1 at Phoenix, that meant a one-time increase of (rounded) 13.92 percent. The same class 1 person at Lafayette received a 10.15 percent increase (6.90 to 7.60) and 10.07 percent (7.45 to 8.20) at San Antonio, but only 3.70 percent 9.45 to 9.80) at Memphis where classes 1, 2, and 3 were retained and no merged. (RX 12).

Roberts' answer certainly was misleading if he was referring only to the top bracket increases for class 3, the highest paid of the classes. Thus, when the class 3 groups are considered we see that their pay increases were only 6.29 percent at Lafayette (7.15 to 7.60), 3.43 percent at Memphis (10.20 to 10.55) where the classes were retained, 9.76 percent at Phoenix (8.20 to 9.00), and 6.49 percent at

San Antonio (7.70 to 8.20 for class 2; there was no class 3). (RX 12). The discrepancy is far worse when we consider the overall weighted increases for the facilities. Recall that Roberts testified that the percentages are weighted by wage category according to the number of employees in each category. (4:825). For example, at Memphis the tabulation was based on "149 class 1 autozoners, 3 class 2 autozoners, and 25 class 2 autozoners." (RX 12b). [Weighting involves multiplying the number in each class by the percentage assigned that class. That yields a number. The numbers are added and divided by the total number of AutoZoners to yield a final number, the weighted percentage. It is simply a method to assign the proper ratio, or weight, to the total number that each class represents in the final number. It is more representative than taking the percentage for each of three classes and dividing by three to get an average number.] The overall weighted percentages were 7.64 percent (my calculation yields 7.66) at Lafayette, 3.30 percent at Memphis, 9.67 percent (I calculate 9.70) at Phoenix, and 10.24 percent (I figure 10.26) at San Antonio. (RX 12).

Well, so what that Roberts misstated the math. In my view it was no accident, but a deliberate attempt to deceive. Roberts was tantalizing his listeners at Greenville about averages elsewhere of 12 to 15 percent, in conjunction with formal and informal remarks reciting how the pay increase matter had to be set aside because of the "poor timing" of the Union's petition. Yet all the while Roberts knew that, at best, the 12 percent to 15 percent range was misleading. It is clear that Roberts did this as part of AutoZone's strategy of inciting the anger of the Greenville employees toward the Union, and the

greater the percentage of the pay raise they were missing out on the greater their anger and the greater the chance they would vote NO on March 5. [George Washington would not approve. "I hate deception," he wrote to Dr. John Cochran on August 16, 1779. J.F. Schroeder, **Maxims of George Washington** 142 (1989, The Mount Vernon Ladies' Association).]

Fourth, Roberts was not a persuasive witness, and I do not credit him unless otherwise indicated.

In short, I find that Vice President Roberts put aside his analysis of the Greenville DC pay raise matter, failed to finalize his recommendation to AutoZone's president, and did not include that recommendation in the recommendation package which he submitted on January 11 to AutoZone's president, not because of any concern over the legality of implementing a pay increase at Greenville, but because of a desire to exploit the pay raise issue in the election which would be scheduled on the Union's petition

As the facts I have summarized show, AutoZone did just that, with words in the January 22 speech (GCX 2) calculated to incite anger directed at the Union, and telling the employees how, in effect, they could vent their anger and frustration against the Union for causing their pay increase to be frozen, by beating the Union in the election so that AutoZone and the employees can move forward, "free of the restrictions" triggered by the Union's petition. As the General Counsel argues (Brief at 26), AutoZone chose to dangle the prospect of a delayed pay raise as a carrot on the VOTE NO stick. (Brief at 26).

I therefore find that the General Counsel prima facie has shown that a motivating factor in AutoZone's failure to include Greenville in the analysis, recommendation, approval, and implementation of its January 11, 1993 decision to make wage adjustments at four of its five (Greenville excluded) distribution centers was the fact that the employees had assisted the Union and AutoZone wanted to postpone the Greenville pay increase in order to help defeat the Union at the election which would be held. I further find that AutoZone has failed to show that it would have postponed its analysis notwithstanding the fact of union activities and solely over concern that to proceed in the face of an election petition, when no pay raise decision had been finalized, would have been unlawful. AutoZone, having failed to rebut the Government's prima facie case, I find that Respondent AutoZone violated 29 USC 158(a)(3) and (1), as alleged, when it failed to proceed with its analysis of the Greenville market survey data, failed to make a decision on January 11, 1993, and failed to implement that decision effective January 3, 1993, with the results reflected in pay checks issued January 22, 1993. I shall order AutoZone to take that action, with the effective date retroactive to January 3, 1993.

Recall that Vice President Roberts testified that had the analysis been made and an adjustment implemented at Greenville, as it was elsewhere, it would have been effective for the pay period beginning Sunday, January 3, 1993, with the increase reflected in the paychecks issued January 22, 1993. (4:842-843).

AutoZone argues that no violation can be found because of the uncertainty respecting the percentage

increases, if any, which Roberts would recommend, and AutoZone's president approve, for the various pay categories, or at least allocate to those categories based on an overall percentage increase. That argument fails. The process is certain. All the data had been gathered. The Hay Group's report on Phoenix and the data gathered by Ferguson indicated that Greenville needed a pay increase exceeding 5 percent. Although no formal decision had been made about a pay increase at Greenville, that lack results from Roberts' failure to analyze the market data and to make his recommendation. He can do that now, and AutoZone's president can make a decision. ***Atlantic Forest Products,*** 282 NLRB 855, 859 fn. 21 (1987); ***Otis Hospital,*** 222 NLRB 402, 405 (1976). Of course, the analysis, recommendation, and decision must not be tainted by additional unlawful motivation.

2. Jackie McGinnis denied cutter position March 18, 1993

a. Facts

Complaint paragraph 10 alleges that AutoZone violated Section 8(a)(3) of the Act on March 18 when it failed to offer Jackie McGinnis (and continues to fail to offer her) a cutter position. Admitting the fact, AutoZone denies any violation.

Jackie McGinnis had been working at AutoZone for 3 years as of the trial. (2:227). Currently she operates a computer. (2:228). She was one of the employees who called the Union in November 1992. (2:242-243, 262). Around the first of January she began wearing a union pin. (2:228, 235). Her name is one of the 32 on the list of

employees on the organizing committee, the list attached to the Union's February 1 letter to DC Manager Ferguson. (GCX 4). When AutoZone, on February 1, began excluding the open supporters of the Union from AutoZone's campaign speeches, McGinnis was one of those excluded. (2:234-235). During the organizing campaign McGinnis worked as an order selector under Supervisor Barbara Cunningham. (2:228, 233, 245). When work was completed pulling orders, McGinnis would do other work, including that of a cutter. (2:229-230). As DC Manager Ferguson explains, a cutter is a person who uses a box cutter to open a box of merchandise. The person then puts the box in a slot so that the merchandise can be pulled on an individual basis rather than by case lot. (5:932-933). It is a service function for the order selector who then is able to pull the merchandise. (2:229).

About the first of February, McGinnis testified, Supervisor Jerome Flowers (not McGinnis's supervisor) told McGinnis that a cutter's position was open. She told him she wanted the job, thereby (at least to her thinking) orally applying for it. (2:229, 245-246). McGinnis did not ask Cunningham about the position. (2:246). Although both jobs paid the same and had the same hours (2:246, 5:933-934). McGinnis wanted to switch to a cutter position because she considered it less stressful. (2:246, 250). The cutter position did not have a production rate but the order selector position did. (2:246; 5:933-934, 962).

On March 18 McGinnis learned that AutoZone had awarded the cutter's position to Carolyn Palmer (2:229, 246, 250), an order selector 2:246) who, during the campaign, had worn a No Teamsters pin and who had served as one of AutoZone's observers at the March 5 election.

(2:229, 240; 5:961). Although many, perhaps most, of the order selectors performed some cutter work (2:229-230, 246), there is no direct evidence that Palmer was one of the many having that experience. McGinnis had seniority over Palmer (2:229, 240), and there is evidence that supervisors have told employees as late as December 1992 that seniority was the basis for promotions or transfers. (2:120, 231, 277-278). Indeed, DC Manager Ferguson concedes that in the past there was a job posting system, but asserts that it was dropped in late December 1992. (5:929-930).

On learning that Palmer had gotten the cutter position, McGinnis asked Ferguson why Palmer rather than McGinnis had gotten the job since she, McGinnis, had more seniority. McGinnis testified that an opportunity had arisen for someone to leave the "Yellow Racks," or H aisle, that it was Palmer and, in addition, the DC no longer was using job titles and employees would receive assignments on coming to work and would do those assignments. McGinnis admits that Ferguson said nothing about the Union. (2:230-231, 248-250).

When McGinnis "applied" to Supervisor Flowers for the cutter position she did not have any absentee problems. (2:231). She had received one warning when $750 worth of sparkplugs did not reach the retail store, but Supervisor Barbara Cunningham told her not to worry about it, that the incident was a fluke, but to pay close attention. (2:232). As an order selector, McGinnis's production rate was consistently one of the highest. (2:247).

At some later point McGinnis obtained a transfer to the computer position she now holds. (2:260). In early

September she was offered a cutter position. (GCX 13; 2:251; 5:934). She declined because she considered the computer position more desirable (2:251) even though there was a possibility the computer position would not remain on the first shift (2:260). Unfortunately, at mid-November 1993, about a month before she testified, McGinnis and her computer position had to transfer to the third shift. Had she known the transfer to the third shift would have happened, McGinnis would have taken the cutter position offered in September. (2:260).

DC Manager Ferguson testified that about mid-March 1993, shortly after the election, he made a management decision to change the method of assigning jobs. Instead of order selectors and others doing one task, such as puling [sic] orders, in the morning, and another, such as stocking the area they had pulled, the second half of the shift, he returned to an earlier system of each employee being assigned to one job for all of his or her shift. This is what he told McGinnis when she asked why she did not get the cutter position. (Actually, Ferguson testified, there had been more than one cutter vacancy to fill.) He had not used seniority in making the new work assignments, but management had assigned workers based on management's perception of their abilities. (5:930-932, 962). According to Ferguson, before the new work assignments, Ferguson was not aware that McGinnis wanted to be a cutter. His first notice was when she asked him why she had not gotten the job. Thus, the decision not to place McGinnis in the cutter position had nothing to do with her support of the Union. (5:932, 934-935).

b. Discussion

The first task is to determine whether the General Counsel established a prima facie case. To make that determination, I do not review the General Counsel's evidence in isolation, but I weigh all the record evidence bearing on the question. ***Peter Vitalie Company,*** 313 NLRB No. 162 JD slip op. 3-4 (Mar. 2, 1994).

First, knowledge of McGinnis's pro-union is well established. Second, although the General Counsel argues that AutoZone departed from an "unrebutted" past practice of assigning controlling weight to seniority, DC Manager Ferguson did offer rebutting testimony. The General Counsel dismisses that by contending Ferguson's new policy, assuming a new one was implemented, was discriminatorily motivated. The complaint contains no such allegation, and the parties did not litigate that as an issue. I note that no evidence was offered of anyone's being told in 1993 that seniority still controls. I find that Ferguson's testimony neutralizes the seniority factor.

There is a dispute whether Ferguson knew that McGinnis desired the cutter position. It is unclear what role Supervisor Flowers had in this other than his informing McGinnis of the opening. That is, was the opening under the jurisdiction of Flowers, under Cunningham, or someone else? Flowers was an order selector supervisor in February 1993. (4:688). But so also, apparently, was Cunningham because she was McGinnis's supervisor. A reasonable inference would be that the opening was in Flowers' area, and that is why McGinnis "applied" to Flowers. That being so, it seems reasonable to infer that Flowers informed DC Manager Ferguson. This is all the

more likely since Flowers, in testifying, did not deny any of McGinnis's testimony.

Respecting the question of whether Flowers knew that McGinnis wanted the cutter position, the General Counsel argues that had Ferguson not known of her desire he would have said so when, in mid-March, she asked why Palmer had gotten the cutter position and she had not. Certainly it would have been a natural response for Ferguson to have answered, at least in part, "Why Jackie, I didn't even know you wanted it." Instead, under the versions of both, he recited business reasons (which differ per the version) why McGinnis did not get the position. It could be argued that Ferguson's answer is consistent with ignorance of McGinnis's desire in that his answer explained why McGinnis was not selected. That is, the answer shows that management reviewed everyone, including McGinnis, and placed everyone according to their abilities as perceived by management. Thus, his answer was not keyed to knowledge that McGinnis had applied for the job, but merely to why she, as others, had not been selected. However, that natural answer, the one not given, is the more credible possibility. Thus, I find that Flowers did report to Ferguson that McGinnis wanted the cutter position, but that Ferguson selected Palmer over McGinnis anyway.

When another cutter position opened in September, AutoZone (through Cunningham) offered the position to McGinnis. This shows, AutoZone argues, that it bore no animus against McGinnis. Although the General Counsel mentions the September offer in relation to the proper remedy, the General Counsel does not evaluate it in terms of its bearing on credibility and whether the evidence

shows a prima facie case. Ordinarily, the fact that the offer came after one of the Union's charges listed the McGinnis situation, with the original complaint making the allegation, would have to be considered, the usual argument being that the offer was made merely to terminate any backpay liability. But here there would be no backpay liability because the positions have the same hours and pay rate. I therefore find that the September offer is a factor which weighs against a finding of animus.

Summarizing, I find that AutoZone knew of McGinnis's union activities, knew that she had cutter experience, and knew that she wanted the cutter position. Despite this knowledge, AutoZone awarded the position to one of its "No Teamsters" election observers – Carolyn Palmer – an order selector who, so far as the record shows, only probably had cutter experience in that most order selectors did. But the Government, to establish a prima facie case of unlawful discrimination, must do more than show that an antiunion person was selected over a union supporter. The evidence does not show pretext or disparity. There is no direct evidence, or inference, of amicus having been directed toward McGinnis. Indeed, the September offer of a cutter position weighs against any finding of animus. In the absence of a finding of animus, direct or inferred, I find that the Government had failed to make a prima facie showing that a motivating factor in AutoZone's not transferring Jackie McGinnis to the cutter position in March 1993 was her support of the Union. I therefore shall dismiss complaint paragraph 10.

3. James Andrews warned July 9, 1993

a. Facts

Complaint paragraph 11 (with conclusory paragraph 15) alleges that AutoZone violated Section 8(a)(3) of the Act on or about July 9, 1993 by issuing a written warning to James Andrews. Admitting the fact, AutoZone denies any violation. James Andrews testified in support, with Timothy Schlichting and others opposing.

Recall the earlier summaries of Section 8(a)(1) allegations against Martin Nelson on February 2 and Timothy Schlichting at mid-February. Although crediting Andrews respecting the Nelson incident, I dismissed the allegation, complaint paragraph 8(h), as to Andrews. Respecting complaint paragraph 8(g) and Schlichting, I credited Andrews (and Stanley Phillip Wilson) and found that Schlichting unlawfully counseled Andrews not to discuss union issues on company time. (This was the incident where Andrews, while cleaning a lavatory in the women's restroom, delayed two female employees from returning to work.)

Recall, also, that Andrews, who began work at AutoZone in August 1992, who openly supported the Union, began wearing a union pin on his collar beginning in late January. He is one of the 32 named in the Union's February 1 letter (GCX 4) to DC Manager Ferguson as being on the Union's in-plant organizing committee, and he was one of the group of committee members who went to Ferguson and Roberts to protest that supervisors were restricting union supporters from campaigning during working time but allowing antiunion employees to roam the plant while campaigning during working time. None

of this prevented Andrews from receiving a favorable performance review, and a pay increase from $6.25 to $6.50 (GCX 7), from Schlichting and approved by Ferguson. Andrews, who signed the review on February 26, testified that he was satisfied with it. (2:307).

Andrews works in the housekeeping department at Greenville under Marshall Hurley, whom Andrews identifies as his supervisor. (2:273). Hurley is an admitted statutory supervisor, but it appears that, at least in July 1993, he may have been a line leader under Supervisor Timothy Schlichting. Hurley's wife, witness Hazel Ann Hurley, described her husband's job as the section leader over maintenance and housekeeping. (4:709). DC Manager Ferguson testified that Marshall Hurley is a line leader. (2:106). However, Schlichting testified that in July 1993 he was Andrews' "acting supervisor." (4:647). Marshall Hurley did not testify. The only relevance this has is to help understand references in the evidence to Hurley and Schlichting respecting James Andrews.

Andrews' job responsibility is to do general cleaning, including emptying the trash, dusting, and mopping and buffing floors (2:282) and, as we have seen, cleaning some of the women's restrooms. Generally Andrews worked during the day, but his hours varied so that on some days he would begin at 6:30 a.m. and on other days end at 6 p.m. (2:286). Andrews' duties ordinarily required him to work throughout the facility. (2:286-287). For a week and a half during the organizing campaign, however, AutoZone removed the general office area from his cleaning duties and the offices of DC Manager Ferguson and Personnel Manager Wartinger for an additional period extending through the March 5 election. (2:284-286,

304-306). Ferguson testified that this had been down because of reports that Andrews was looking at papers on the desks. Based on the reports, Ferguson decided to exclude Andrews from the areas where confidential information would be available. Ferguson "thinks" that Supervisor Schlichting orally counseled Andrews, at the time Andrews was excluded from the office area, about looking at items on desks. (5:963-965). During his testimony Schlichting did not describe the March exclusion or mention any oral counseling of Andrews. During cross examination Andrews testified that the written warning he received in July 1993 is the only occasion he was ever talked to about reading papers on anyone's desk. (2:299-300).

The July warning came about after two receptionists, witnesses Betty Beacham (3:555-556, 558-560, 563-564) and Wendy Vaughn (3:568-573, 576) reported to Personnel Manager Wartinger on July 7 that, on the morning of that day, they had observed Andrews, while in Ferguson's office to clean and buff, touching and reading a paper on Ferguson's desk. Beacham places her report to Wartinger at about 9 a.m., with her observation occurring some 30 minutes earlier (3:558, 563). At Wartinger's request, the following day they wrote brief statements (GCX 8b,c) concerning what they had observed.

When he arrived for work on June 28 at his usual 7 a.m., Accounting Manager Ricky Trammell testified, he observed Andrews, with a wastebasket on the desk of one of the accounting clerks, looking at a paper he was holding. Appearing startled, Andrews put the paper in the trash can and then proceeded to empty the trash into a bag as part of his cleaning duties. That morning Trammell

reported the incident to Wartinger who, later that day, asked Trammell to make a written description of his observation. It was a week before Trammell wrote his statement (GCX 8d). (3:581-585, 588-590).

For his part, Andrews concedes that about July 7 he did read a newspaper clipping that was lying on Ferguson's desk. The clipping described a Greenville company, Standard Trucking, about to close, with employees losing their jobs and not being able to vote in an election. Andrews denies picking up the clipping or moving any items on Ferguson's desk, and he denies ever moving any papers on supervisors' desks in order to read papers on the desks. (2:282-284). Admitting that he previously had read material on other desks, Andrews states simply that the papers he has read have been lying open for anyone to see, and "I was curious." (2:300-301). During the organizing campaign it was mostly newspapers which he dug out of wastebaskets. (2:304).

Supervisor Schlichting did not participate in Personnel Manager Wartinger's investigation of obtaining written statements. (4:630, 647; 5:962). On either July 8 or 9, Schlichting testified, Wartinger informed him that a decision had been made to issue a written warning to Andrews because he had been observed touching documents on the desks of Ferguson and others. (4:650-651). Schlichting testified that he had observed Andrews, while cleaning Ferguson's office, "long-necking everything." (4:651). Schlichting gives no time frame of his observations or whether he said anything about it either to Andrews or to Ferguson. Ferguson testified that he did not confer with Schlichting about the July warning. (5:962).

Ferguson testified that he approved the issuance of a written warning, and even considered firing Andrews, because Andrews' conduct violated AutoZone's written policy [not in evidence] that protects confidential information. Andrews' "going through trash cans, looking at that information – going through and looking at information on my desk – I felt it was a very serious violation that I would have someone whose responsibility was to mop and wax the floors, going through and looking at information that was on my desk." (5:911). Although AutoZone's policy provides for progressive discipline, the earlier warnings were skipped and a "serious violation" approved because Andrews "had access to look at confidential information – and it was very obvious that if he was looking at information that was on my desk, he had no reason to be looking at information that was on my desk." AutoZone's policy handbook, Ferguson testified, allows skipping the earlier steps when the infraction is deemed serious. (5:913-914).

Asked, on cross examination, what confidential material it was that Andrews had read, Ferguson testified that he had no idea, but that it was the information "that was on my desk." (5:963). Ferguson considers it a "very serious concern," particularly after Schlichting, as Ferguson recalls, orally counseled Andrews on this topic during the organizing campaign. (5:964-965).

On Friday, July 9, Supervisor Schlichting escorted Andrews to a meeting attended by Schlichting, Andrews, and Personnel Manager Wartinger where Andrews was given a written warning (GCX 8a). (2:279, 4:629-630, 650). Andrews asserts that Schlichting did most of the talking (2:279), but Schlichting claims that Wartinger did (4:654).

Schlichting testified that the written warning was prepared before the meeting with Andrews. (4:650). The warning, in evidence as an AutoZone "Corrective Action Review" (GCX 8a), has blank spaces beside the four categories of verbal warning, first written warning, second written warning, and serious violation. The latter was checked on this warning. For the last category, the employee "may be separated without prior warning." The type of infraction is listed as "Unauthorized possession/handling of confidential information."

"Details Of Infraction" are stated on the written form as:

> On several occasions you have been observed by management and fellow AutoZoners reading papers thrown away in the trash and handling paperwork on the desks of office personnel and the DC Manager. This type of conduct is unacceptable.

"Suggestions For Improvement are stated in these words:

> Jim, when performing your housekeeping duties you should pick up the bags of trash and throw them away, not read through them. When cleaning the floors you should mop, sweep or buff, not read or handle any paperwork on desks.

Wartinger and Schlichting signed (2:85), noting on the form that Andrrews had refused to sign. Andrews testified that he did not sign because he had done nothing wrong. (2:282, 316). The final block is a printed notice warning that performance must improve or, should the same vioaltion recur, action will be taken. That action is described, in hand, as:

> Any further conduct of this kind will result in termination.

Ferguson acknowledges that this warning would permit AutoZone to terminate Andrews for a repetition of this type conduct, and that it does not matter to him whether Andrews is prounion or procompany. (5:969). On the other hand, Ferguson admits (5:975-976) that his following remarks in the Ferguson/Roberts speech of February 1 about "button wearers" refer to employees such as Andrews, Stanley Phillip Wilson, Robin Delk, Jackie McGinnis, and other (CPX 7 at 14):

> Speaking of button wearers, are these really the type of people you want running the union's show in here if the Teamsters are somehow able to dupe enough AutoZoners to vote for them and to get in here? Are they the kind of leaders you want to entrust your jobs and your futures to? Are they the people you want speaking for you? You can keep yourselves free of their control and the control of the International by voting *NO*!

Ferguson disclaims any purpose by the words of trying to convey any message other than the voters had a decision to make. He was not trying to isolate anyone by referring to "type." Beginning with the February 1 speech, those wearing union buttons were excluded from AutoZone's other campaign speeches. (5:925, 974, 979).

Andrews testified that during the July 9 interview Schlichting said a warning was being issued to Andrews for reading material out of wastebaskets, on top of desks, the DC Manager's office, and confidential matters on the desks of others. Schlichting said they had a witness.

(2:279-280, 282, 300). Andrews claims not to know if the charge of reading papers on desks referred to Ferguson's desk because he has read papers on other desks and he has no idea what they were talking about on July 9. (2:300).

During the warning interview Andrews reminded Schlichting of an incident some months earlier when Schlichting had discarded a letter addressed to Andrews. In late January Marshall Hurley asked Andrews about cleaning the carpet in the upstairs conference room and to obtain the cleaning chemicals. Andrews called several dealers in the area, one being Garrison's Cleaning Service which took Andrews' name and (company, apparently) address. In mid to late March, dumping as Andrews was Schlichting's trash, Andrews discovered a letter addressed jointly to him and to AutoZone inviting them to an open house at Garrison's. Angered that Schlichting had discarded mail addressed to him, Andrews waited a few days to see if Schlichting would say anything. Hearing nothing from Schlichting, Andrews then reported the matter to Ferguson. (2:280-282, 302-303). The end result was that Schlichting, at Ferguson's suggestion, apologized to Andrews, saying that it was not intentional. (4:654-657; 5:914-915). Andrews, Schlichting testified, replied "Well, you still threw it away." (4:657).

About a month after his August 1992 hire at AutoZone, Andrews spied an envelope, marked "Personal and Confidential," and bearing Andrews' name, on Schlichting's desk. Taking the letter and opening it, Andrews found information about life insurance. (Company life insurance, presumably.) For unstated reasons, Andrews reported this to Wartinger who said nothing. Indeed,

Andrews testified, he was never told he could not read papers addressed to him which he found on the desks. (2:281-282). Andrews presumably considered it improper for Schlichting to have on his desk the personal and confidential envelope for Andrews. During his testimony, Schlichting did not address this incident, and did not explain whether he simply was waiting to deliver company mail to Andrews.

In any event, Andrews suggests that he looks through trash to see if there is anything addressed to him. (2:304). No one, he testified, had ever told him that it was unacceptable for him to inspect an item on DC Manager Ferguson's desk. Further responding to counsel's question, Andrews replied, "I don't have a problem with reading newspaper articles, do you?" (2:315). Andrews testified that so far as he knew Ferguson trusted him to clean around his desk. (2:309).

The July written warning had no impact on the next performance review given to Andrews. Thus, for his February performance review he was given the middle rating of "Achieves Requirement" plus a pay increase of 4 percent. (GCX 7). For his August performance review (GCX 9), signed by Andrews on September 2, Assistant DC Manager Cunningham, giving Andrews the same rating, marks for improvement for Andrews to spend less time on a given task. Cunningham compliments Andrews' willingness to accept spot assignments and compliments the quality of his work. Moreover, Andrews was given a pay raise to $7, a 7.69 percent increase – a bigger percentage increase than he received in February before the warning.

b. Discussion

The Government's position on brief appears not to be that a warning issued at all, but that the warning which issued was at the last step, a "serious violation" warning. The General Counsel sees this as nothing more than laying the paper foundation for an immediate discharge of James Andrews on a pretext that the slightest mistake would be perceived as falling in the area of his July warning.

As described, there is some indication that both Schlichting and Wartinger did not show immediate alarm on either observing Andrews "long-necking" in Ferguson's office (Schlichting) or when Wartinger learned that Andrews, a month after being hired, removed a letter, addressed "Personal and Confidential" to Andrews [apparently a letter which Schlichting, as the supervisor, would have delivered to Andrews] from Schlichting's desk. There also was some delay in Wartinger's obtaining Accounting Manager Trammell's typed statement, although Trammell could not recall whether Wartinger was out (3:584), possibly explaining why Wartinger did not remind Trammell after a day or two rather than the week it took Trammell. The key person, however, is DC Manager Ferguson, for it was the news that Andrews had been reading a paper on his desk that really got Ferguson's attention and persuaded him that this was a serious matter.

AutoZone's policy handbook provides for skipping to the last warning, and the General Counsel offered no evidence here that AutoZone has ever given anyone else a lighter discipline for similar conduct. Nor is there any

evidence of a pretext. Certainly the penalty imposed could have been lighter, such as a first written warning, and under AutoZone's policy for a serious violation, Andrews could have been fired. The question here, however, is whether union animus was a motivating reason for the "serious violation" warning which was given. Whatever animus existed in Schlichting's unlawful warning to Andrews in mid-February, concerning the restroom incident, was so anemic that it had no adverse impact on the performance review which Schlichting gave Andrews later that month. (Although Schlichting signed earlier in the month, he could have changed it before giving it to Andrews later in the month.) Andrews apparently had experienced no problems with management after the March 5 election. AutoZone knew full well that Andrews was a strong union supporter, and excluded him from Ferguson's office, at some point, until the March 5 election. Andrews received similar performance ratings both before and after the July warning. As Andrews testified that he was satisfied with his February evaluation (2:307), presumably he was satisfied with his August appraisal as well.

Ferguson's recall was a bit fuzzy, and details lacking, concerning whether Schlichting reported to him, about February, that he had counseled Andrews at the time Andrews was excused from cleaning the offices during the campaign. (5:964-965). Schlichting did not address the point, and Andrews asserts that the July 9 warning was the first time he was talked to about reading papers on desks. In these circumstances I credit Andrews that he was never previously counseled or warned.

Ferguson described AutoZone's policy handbook as permitting a "serious violation" for improperly handling "confidential" information. The only paper identified by any of the witnesses was the newspaper clipping described by Andrews. I credit Andrews that what he was reading on July 7 at Ferguson's desk was the newspaper clipping, and that it was that clipping which the two receptionists observed him reading and, I find, touching the clipping. By Ferguson's definition the fact that the paper – regardless of its nature – was on his desk made it confidential. (5:911, 963). The written warning is broad enough to cover items thrown into the trash at any of the desks. On one hand it can be said that Andrews can avoid any problem simply by emptying the trash, not reading it or papers on the desks. On the other, it is clear that the warning could be used as a tool for mischief.

As noted, there is no evidence of disparity or pretext, and the only evidence of arguable animus predates the February performance appraisal yet had no adverse impact on it. There is no other evidence of animus directed toward Andrews because of his strong and open union activities. The July 9 warning had no adverse impact on the performance review which Andrews received less than 2 months later, and the pay increase he received was greater in amount and percentage than what he received in February.

Perhaps the key lies in Andrews' assertion that with the resumption, after the March 5 election, of his access to Ferguson's office, Ferguson trusted Andrews to clean around his desk. (2:309). But after Andrews was observed on July 7 reading a paper on Ferguson's desk, it is clear

that Andrews no longer enjoyed Ferguson's trust. Ferguson testified that Andrews' union activities played no part in the July 9 warning. (5:969). On this record, I credit Ferguson. Finding, therefore, that the General Counsel failed to establish a prima facie case of unlawful motivation in the July 9, 1993 written warning to James Andrews, I shall dismiss complaint paragraph 11.

4. Stanley Phillip Wilson fired September 13, 1993

a. Introduction

Complaint paragraph 12 alleges that AutoZone violated Section 8(a)(3) of the Act when it fired Stanley Phillip Wilson on September 13, 1993. Admitting the fact, AutoZone denies any violation.

A large portion of the record is devoted to the Wilson discharge. The bottom line is that I do not believe Wilson. Except where I credit Wilson, generally when he corroborates someone's credited testimony or is supported by credited evidence, I do not believe anything he says. The record demonstrates that Wilson frightened female employees, threatening the young daughter and husband of Hazel Ann Hurley, and, holding a cardboard knife to Hurley's throat, said "See how easy it would be for me to cut your throat." (4:714). Contending that he only showed a foot-long cardboard knife to Hurley, Wilson denies that he threatened Hurley, denies that he held it to her throat, and denies that he even teased her with it. (2:129-130, 184-185). According to Wilson, he merely showed Hurley a foot-long knife he had cut from cardboard, and she simply said, "Oh, well big deal." (2:184-185). DC Manager

Ferguson testified that one of the motivating reasons for the discharge of Wilson was the threats he had made to Hazel Ann Hurley. (5:919-920).

Citing evidence that employees, particularly Wilson, joked and engaged in horseplay, the General Counsel argues that AutoZone's reliance on the cardboard knife incident, and other alleged threats, to justify Wilson's discharge was merely a pretext to mask its unlawful purpose of getting rid of an activist supporter of the Union. Finding no merit to the Government's case, I dismiss complaint paragraph 12.

b. Facts

Earlier, in treating allegations against Supervisor Schlichting (paragraphs 8(l),(m)), I summarized Wilson's job duties and his open and vigorous support of the Union. Thus, company knowledge is well established that Wilson was strongly prounion. Respecting Wilson's work history, I should add that, although Wilson did not arrive at the Greenville DC until either January 1991 (2:100, Ferguson; 2:117, 148, Wilson) or possibly April 1992 (4:648-650, Schlichting), he had been working at one of AutoZone's retail stores since his hire date of September 30, 1986. (2:117). Ferguson, who had been the district manager over the area retail stores when Wilson worked in the store, and Supervisor Schlichting brought Wilson to Greenville DC because of his knowledge of parts and their salability in the stores. (2:117; 4:611, 647-648; 5:951, 970). Ferguson recalls 1991 as the year in which Wilson transferred. (2:100). For Wilson's July 1992 performance evaluation (GCX 10), Schlichting gave him the top rating

of "Exceeds Requirement." (4:648-649). Although no other performance reviews are in evidence, Wilson's technical abilities and knowledge are not in issue. Ferguson describes him as having been a "good average employee." (2:104). From the March 5 election until his September 13 discharge, the only formalized problem Wilson had with AutoZone's management was a September 3 first written warning (GCX 11) for poor attendance. Wilson goes by the short name of "Phil Wilson." (2:117).

In the early afternoon one day around mid to late-August 1993, the receptionist informed Ferguson that a male caller had made a telephone bomb threat. This came in the early afternoon. Ferguson ordered the plant evacuated for the balance of the day. No bomb was found and the police have not apprehended anyone. The next day members of management were told by employees that they should interview Wilson about the bomb threat because there were rumors he had talked of making a bomb. [AutoZone asserts that it makes no contention Wilson telephoned the bomb threat. Brief at 53 fn. 31.] Based on these reports, Ferguson instructed Assistance DC Manager Barbara Cunningham and Personnel Manager James S. Wartinger to investigate the matter. (2:103-104, 137-138, 174; 4:749, 759-760; 5:915-918, 952-953, 970-971).

So far as the record shows, employees who submitted signed statements during the investigation were, Debra Shue, statement of August 31 (GCX 12c); Jeananne Cole, statement of August 31 (GCX 12d); and (Hazel) Ann Hurley, statement of September 9 (GCX 12f). Shue did not testify. As Ferguson does not rely on any incident

described in Shue's statement, I shall not quote it. Concluding that Wilson could not make a bomb by mixing the Greenville DC's chemicals, Ferguson testified that the reasons AutoZone discharged Wilson did not include the allegation that he would make a bomb and destroy the DC. (5:955).

About 2 weeks before his discharge, Wilson testified, Ferguson informed him that he was investigating some allegations against him and that he soon would have a final decision. (2:136). Before he was called to his September 13 discharge meeting, Wilson was not interviewed for his version as part of AutoZone's investigation. (2:136). Acknowledging that the decision was made to discharge Wilson before Wilson was called in (2:105; 5:920), Ferguson testified that the AutoZone policy, at least at Greenville, is to "gather the facts" and make a decision before confronting the accused employee. At the time of the disciplinary interview, if the employee presents evidence which counters the basis for the decision, then Ferguson would reconsider his decision because his decision is "not irrevocable." (5:920-921, 955). [Recall from Schlichting's testimony that the same procedure was followed respecting the written warning issued to James Andrews. (4:650-651).] As Wilson, Ferguson testified, presented no such countering evidence, his conduct, in Ferguson's view, constituted harassment of employees which, under AutoZone's written policy [no written policy in evidence] calls for discharge. (2:109; 5:958-959). Actually, Ferguson recommended the termination (5:920) and Vice President Roberts, some 2 to 3 days before Wilson's discharge, decided that Wilson should be discharged under AutoZone's corporate policy against

harassment. (2:104, 109). There is no record evidence that the procedure followed in Wilson's case deviated either from AutoZone's corporate policy or Greenville's past practice.

On Monday, September 13, Assistant DC Manager Barbara Cunningham escorted Wilson to DC Manager Rick Ferguson's office where, in the presence of Cunningham and Personnel Manager James Wartinger, Ferguson said that a decision had been made. Ferguson said that other employees had stated that Wilson had been harassing them. Ferguson cited three incidents and asked if he had any explanation. (2:128; 5:921, 958-959). At the conclusion of the interview, after Wilson had offered his explanations. Ferguson said he was terminating Wilson for harassment. (2:135; 5:921, 959). Protesting that he had harassed no one, Wilson asked Cunningham if he could see the papers. Cunningham said no and for him to "hit the door." (2:135). Wilson testified that he neither signed a termination paper nor had any conversation with Wartinger about signing. (2:136). The termination form (GCX 12a), signed only by Wartinger, records that Wilson "did not sign." [During his initial testimony, when called by the General Counsel, Ferguson testified, 2:104-105, that Wartinger took Wilson to his office to sign the termination form.]

I credit Wilson's testimony about Cunningham's remark, and about not signing and having no conversation with Wartinger about signing. First, Cunningham, who testified about other matters, did not address Wilson's case. Although Wartinger is still AutoZone's personnel manager (5:983), he was not called as a witness. Wartinger's one-page minutes of the meeting are

attached to the termination form. (GCX 12b). Thus, of the four attendees at Wilson's discharge interview, only Ferguson and Wilson testified about Wilson's case. Second, Wilson's testimony about this is consistent with Ferguson's version and with Wartinger's minutes. As Wilson did not ask Ferguson about inspecting the papers, it is likely that the exchange with Cunningham occurred as they were leaving Ferguson's office.

The one-page termination form, "Corrective Action Review," is marked "Serious Violation – May be separated without prior warning." (GCX 12a). Under type of infraction is hand-printed, on the first line, "Harassment" and, on the second line, "Hostile Acts/Abusive Conduct." As the hand-printed test on the form conforms to the minutes and to two of the statements (Debra Shue's and Jeananne Cole's) also signed by Wartinger, I find that the hand-printed text is by Wartinger. Barbara Cunningham also signed the minutes under Wartinger's signature (GCX 12b), but she writes in script as is seen by her recording of Ann Hurler's [sic] statement. (4:727).

In the block "Details Of Infraction" appears the following hand-printed text:

> On several occasions Phil Wilson has harassed and threatened fellow AutoZoners with harm. This type of conduct will not be tolerated and is cause for S. Phil's termination.

In the next block, "Suggestions For Improvement," appears, hand-printed, "See attch statements." Actually, it appears that, running out of space in the infraction block, Wartinger printed the "See attch statements" on the next line, the first line of the suggestions block, as a

continuation of the block for infraction details. The statement attached have nothing to do with Wilson's continued employment at AutoZone, but relate directly to the basis for the asserted infraction.

The text of Wartinger's September 13 minutes (GCX12b) read:

> On this date, Phil Wilson, was brought into Rick Ferguson's office. Rick Ferguson, Barbara Cunningham, Phil Wilson and myself were in attendance. Rick told Phil that several of his fellow AutoZoners had complained of Phil harassing them and that he had threatened them. Rick mentioned the incidents of [1] making a paper knife and acting as if he was stabbing someone, [2] chasing Curtis w/ a handsaw and [3] having the 2x4 to hit David Bradberry.
>
> Phil admitted to all 3 incidents, saying he chased Curtis w/ the saw but did not intend to injure him. He did have the 2x4 to hit David with, because David kept bumping the hazardous waste barrels with his forklift and it made Phil mad. And that he did make the paper knife and stabbed at the Zoner (Ann) but he did none of this maliciously.
>
> Rick informed Phil that conduct of this type was unacceptable and that he was terminated effective immediately.

Ferguson testified that he cited the three incidents of Wilson's chasing Curtis Carrington with a handsaw, of planning to hit David Bradberry with a piece of 2x4 lumber, and making a cardboard knife and holding it to Ann Hurler's [sic] throat. Wilson, Ferguson testified, admitted the incidents, explaining that he meant no

harm. These admissions confirmed for Ferguson that his discharge recommendation was correct, and he therefore fired Wilson for harassment based on these three items plus the other incidents described by Ann Hurley. (5:921-922, 955, 959). Denying that Wilson was given no opportunity to rebut additional incidents described in Hurley's statement, Ferguson explains that had Wilson denied the cardboard knife incident then he, Ferguson, would have asked about other incidents. In view of Wilson's admission about the cardboard knife, there was not need to go into other details, for Wilson's admitted conduct constituted harassment which Ferguson would not tolerate. (5:956-957, 959).

Wilson asserts that he told the Ferguson group that Carrington (who jokes a lot with Wilson) pushed Wilson as the latter was cutting a box for Ann Hurley. Wilson, carrying the handsaw, "walked real fast" (2:128, 188-189) to catch up with Carrington. When he reached Carrington, Wilson asked why Carrington had pushed him. Carrington explained that he was only joking. Satisfied with the answer, Wilson returned to his area. (2:128, 189). Although Wilson, in his pretrial affidavit, asserts that he had "chased" Carrington on this occasion, at trial he testified that "chased" means about the same as "walking fast." (2:195-196). Carrington testified that Wilson briefly "chased" him. (2:204). Carrington apparently passes it off as horseplay, although he observed that it was the first time Wilson had "picked up something." (2:204-205).

Respecting the Bradberry incident, Wilson testified that he told Ferguson he uses a 2x4 in this work to pry up boxes that have fallen between racks. (2:130-131). Although at trial Wilson gives more details, he does not

say that he reported these additional details to Ferguson on September 13.

As for the cardboard knife matter, mentioned in my introduction to this section, Wilson claims he told Ferguson that, to kill spare time at work, he, as do employees in the core section, throw cardboard cutouts at one another. From one of these box flaps he carved a knife "and I showed it to Ann Hurley" who said "Oh, well." "Nothing really happened." Wilson explained. Employee Teomie Clay was present, Wilson testified. (2:128-129). (Clay testified that she never saw a knife, but that on one occasion Hurley jumped and said "Teomi, make him stop." Clay and Hurley then both laughed. 2:209, 223). As I mentioned in the introduction, at trial Wilson denies holding the cardboard knife to Hurley's throat. (2:130, 185). However, in describing what he told Ferguson at the September 13 meeting, Wilson recites only what I have set forth above.

Turn now to what Ferguson had before him at the time of his decision. As noted, Ferguson had before him the statements of Debra Shue, Jeananne Cole, and (Hazel) Ann Hurley. Cole and Hurley testified, but Shue did not. Because Ferguson did not list any item from Shue's statement as one of the grounds for Wilson's discharge, I shall omit Shue's statement. Although Ferguson testified that he talked with Cole (2:107, he later corrected this to say that he had not. (5:919). He did meet with Hurley. (2:107; 5:919-920, 956). It is clear that Ferguson was strongly influenced by Hurley's report.

Before I quote the written statements of Cole and Hurley, a brief clarification of Jeananne Cole's status is

necessary. When Wilson arrived in 1991, his immediate supervisor was Line Leader Cole (an admitted statutory supervisor) who in turn reported to Advisor Timothy Schlichting. (2:148-149; 4:620, 740). Around late spring or early summer 1993, Cole took a maternity leave returning from that leave about August 2. (4:750, 757-758). About 3 weeks into August, Cole relinquished her line leader position, and became a defect coordinator, because the overtime required in the line leader position interfered with the time she needed to devote to her young child. (4:740, 757-758). When Cole signed a written statement (GCX 12d) for Personnel Manager Wartinger on August 31, she was no longer a line leader (4:757, 758). Nevertheless, at the time of the events described in her August 31 statement, she was a line leader. (4:759).

Recall that in the second part of August the facility had to be evacuated because of a telephoned bomb threat. A week or so before giving her August 31 statement, Cole testified, employees Ann Hurley and Debra Shue informed Cole that Phil Wilson had made statements that he would blow up the DC. Thinking that Wilson perhaps could harm someone, Cole, after several days, went to Personnel Manager Wartinger. (4:749-750). Cole made her statement to Wartinger on August 31. (4:747).

In her statement Cole describes four items respecting Wilson. At trial Cole describes the first three (handsaw; 2x4; cyanide; but not the fourth – Waco). The text of Cole's August 31 statement of one and a half pages reads (GCX 12d):

> On or about August 16, 1993, after lunch, Phil Wilson, Curtis Carrington, and Jeananne Cole

were in the 4800 aisle. This is a statement of what happened.

I [was] coming down from lunch to check the area to see how work was progressing. I was walking down the aisle between 4800-4900. I saw Phil with a handsaw in his hand chasing Curtis Carrington acting like he was going to cut him. I approached Phil and asked him what he was doing. Phil said he was chasing Curtis with [the] saw. He did not say why. I told Phil not to do this that he might offend or hurt someone. I told him to go back to his area. I asked Phil why he had a saw in his hands. He told me he used it to cut core boxes down so it would be easier to put merchandise in.

On or about August 16 or 17, I came in to Phil's area. Phil told me he had gotten a 2x4 because David Bradberry had moved a pallet and almost his [sic] Phil with the pallet. He said he had gotten the 2x4 so next time David almost hit him, he could knock David off the forklift with the 2x4. He appeared very upset and angry. David Bradberry and Keith Henderson had warned me prior to going into Phil's area that he was angry about the incident.

On or about March/April 93, Phil had a big bag of candy passing it out to everyone in the section. After I had put some in my mouth, Phil stated "he could have laced the candy with cyanide." I assumed he meant he could have hurt people in the section by doing this. It made me so wary of Phil that I don't eat any of the candy he has offered since.

During the [spring 1993] Waco, Texas Massacre, Phil mentioned many times how he was excited

about it and how he couldn't wait to get home to watch it on Oprah, the news etc.

Ann Hurley gave her four and a half page statement (GCX 12f) on September 9. Assistant DC Manager Cunningham served as the amanuensis. (4:727, 732). The day after the bomb threat, Hurley testified, Cunningham, also serving as Hurley's supervisor, approached her about the rumors concerning Phil Wilson. (4:722, 726). Initially uncertain as to how far she wanted the matter to progress, Hurley only told Cunningham about some of the threats Wilson had been making against her. (4:722-723). No statement was taken at that time. (4:724). Some 2 or 3 weeks later Hurley was interviewed by Ferguson in the presence of Wartinger. (2:107; 4:724-726; 5:919). At the conclusion of that interview Hurley asked to speak with Cunningham alone. Either that same day, or later, Hurley met alone with Cunningham and gave her statement of September 9. (4:726-727).

Before I quote the text of Hurley's statement, some background is necessary. During the relevant time Hurley and Wilson worked in the Credit Returns department. (4:612, 707). Hurley would sort damaged products and place them in boxes for return to the vendors. A conveyor belt separated her work area from Wilson's primary work area. (4:708). Employee Teomie Clay worked nearby, in the same department, at a computer. (2:208; 4:713). In her September 9 statement Hurley describes certain threats by Wilson against her, her husband, and her young daughter. Her husband is Line Leader Marshall Hurley. (4:708-709). Her daughter's name is Allison (4:711), not the "Alician" as spelled in her September 9 statement.

Hurley testified that daughter Allison was born in February 1992. (4:711, 737). Allison, therefore, would have been about 18 months in August 1993. Hurley apparently worked in the Receiving department before taking her maternity leave. After her maternity leave Hurley first went to Receiving, but about September or October 1992 she was transferred to the Credit Returns department where she first met Wilson. (4:734-735). Hurley's September 9 statement reads GCX 12f):

> Phil Wilson has been making remarks to me for many months. Remarks that started to concern me, making them over and over. As in, saying I'm going to kill Marshall, he's going to take Alician, also asking how Alician's doing each day and he's Alician's godfather and he's going to take Alician his weekend and they couldn't stop him. That he was going to kill Marshall and take Alician since he was the godfather and had visitation rights. [Hurley denies that Wilson is the child's godfather, 4:712, and at trial Wilson makes no such claim of godfather status.]
>
> Phil also said he was going to make another Waco, Texas in our warehouse and blow up the place making sure me & Marshall was in here, and he was going to get Alician. I asked Phil how he knew where Alician was and he said "wouldn't you like to know; I know a lot of things, so watch out."
>
> On August 24, 1993 Phil said when he had a child, it was going to be a boy. He would name him Jason, and send him after my child and he (the boy) would take care of her. After Phil said that he started making weird noises, laughing like he was crazy and said to me, "Welcome to

Phil's world – This is the Real World," saying it real wild.

Phil and I were working in damages. Phil was running the computer, and I was taking the merchandise off the belt and putting [it] on the cart. Phil had a part that didn't have a number so I went to get it for him and as I was coming back down Phil was holding the scanner pointing it at me saying he was zapping me. He put the gun down and as I was going toward the rack Phil was starting to come towards me., leaning forward and making strange noises and I told Phil to stop it. I walked back as far as I could go and I was up against the rack where the boxes are. I turned my head because Phil was right up against me and I could feel his breath on my face. I felt Phil do something with his hand. I know he reached down like searching in his pockets and the next thing I know I felt something under my chin and for a brief moment I thought it was a knife, but I was not sure. Phil said, "Do you think I won't? You just try me if you think I won't!" He was saying this right in my face. I could still feel his breath on my right cheek. He started laughing crazy. I told him I was going to the bathroom and I left the aisle. He said he would take care of things while I was gone, in a very strong determined voice while he was talking through his clenched teeth.

I kept thinking to myself I need to make sure that's what Phil had (a knife). So I went back to my station and started working again. There was a box taped up and Phil couldn't find any paperwork, so I looked for paperwork and then told Phil it could be inside the box. I reached for my safety cutter and it was not in my apron. I

> started to reach for Teomie's cutter and quickly thought I should ask Phil if he had something to open it with. Phil reached into his pocket. Opened the knife and cut open the box. As he was closing his pocket knife he had [a] smart smirk on his face. And then [he] turned around and went on with his business.
>
> The Thursday before [August 19], Phil made cardboard knives (out of a box) and came up from behind me and stuck it under my throat, saying "See how easy it would be to cut your throat." I told Phil to stop, Teomie told Phil he was crazy and stop and leave her alone. After this, he went back to his cart. Then a couple [of] minutes later he came back and put the cardboard knife in my stomach and said, "I'll cut your baby." I told Phil to stop and quit. Then Teomie yelled at Phil furiously. He came back again reaching under the belt acting as if he was cutting my legs. He said, "I'm going to cut your legs off." I told Phil again to please stop. And Teomie went over and yelled at Phil again.

Beginning about late December 1992, Hurley testified, Wilson began expressing an interest in Allison, such as asking about her. (4:737-738). Eventually the expressions turned to threats of kidnapping Allison from the sitter and of killing Marshall Hurley. By April/May 1993 Wilson made these threats on a daily basis. (4:710-711, 731, 734). There is substantial evidence that some of the employees in the department, along with employees in the Core department, would engage in horseplay. (Cores are from alternators, starters, and master cylinders. 2:117, 133.) Wilson describes how he and employees from the core line, in the dock area, would throw boxes or sail

pieces of cardboard at each other. (2:133-134). They would do this when the supervisors were not looking. (2:135). If a supervisor did see it, the employee or employees would be told to stop, but no disciplinary penalty would be imposed. (2:135, 191). Some confirmation of this exists in former Line Leader Jeananne Cole's statement, quoted above, about the handsaw incident (Wilson chasing Curtis Carrington) and the 2x4 incident (although Cole's description there is of an angry Wilson planning to knock David Bradberry off his forklift with a 2x4). Other than putting a stop to the incidents, Cole neither formalized her cautions to the employees nor informed management of the incidents.

Wilson, at least, was well known by several employees as a person who joked a lot and engaged in horseplay. As Cole describes, however, until the handsaw and 2x4 incidents, jokes and horseplay by Wilson and others had been verbal, not physical. (4:755-756). Even Curtis Carrington, who passes off the handsaw matter as some momentary horseplay by Wilson (2:204, 205), admits that it was the first time Wilson had ever "picked up something." (2:205).

Hurley insists that she seldom joked with Wilson, and even then it would be about such things as a ball game. (4:729). Teomi Clay tells a different story, describing incidents where Hurley would laugh about Wilson's horseplay (2:209, 210, 218-219) and, for example, when he would "zap" her with the scanner gun. (2:209, 210, 218-219, 223). Clay, who admits that she thinks Wilson was wrongly fired (2:216-217), eventually concedes that by August Hurley was expressing concern about Wilson's remarks about her daughter, although, in Clay's opinion,

Hurley did not get serious until after meeting with Ferguson in August. (2:215-217, 223-224). Hurley testified that about 90 percent of the time Wilson's threats to her would be when no one else was around. (4:713). Clay did not testify persuasively, whereas Hurley did.

Neither party called David Bradberry to testify. Cole testified that when she asked Wilson about the incident he showed her the 2x4 on this work desk and stated that the next time Bradberry almost hit him with a pallet Wilson was going to knock Bradberry off the forklift with the 2x4. Cole told Wilson to calm down, that she would talk to Bradberry. Cole spoke to Bradberry and told him to be more careful. (4:744-745-746). Cole did not formalize her caution to Wilson on the handsaw incident, and she did not discipline either Wilson or Bradberry or report (until her August 31 statement) that incident to management. (4:745-746, 752). Although Cole never spoke to Carrington (4:752), Cole personally observed Wilson chasing Carrington with the saw. (4:741).

In confirming the cyanide incident, Cole explains that she was pregnant at the time and Wilson's remark upset her. (4:750). Although Cole, in her August 31 written statement, assumes that Wilson meant he could have hurt employees in the section by lacing the candy with cyanide, Cole testified that she did not report the cyanide incident to management, until August 31, because she was not sure Wilson had told anyone else in the Section, and she saw no need to report a remark made only to her. (4:751). Wilson denies making the cyanide remark. (2:187).

Ferguson testified that before his decision he read the statements of Cole, Hurley, and Shue. He testified that he was motivated to recommend Wilson's discharge based on the reports of management, the information he received from Ann Hurley, and the Curtis Carrington (handsaw) and David Bradberry (2x4) incidents. (5:918-921, 954-955). Ferguson did not list the cyanide remark to Cole. Wilson's union sympathies were not a factor, Ferguson testified. (5:922-923).

Teomi Clay testified that Assistant DC Manager Cunningham spoke to her in the returns area about 2 to 3 weeks before Wilson was fired. Cunningham asked if Wilson had said anything about a bomb threat. Clay said no, but that Wilson had said the chemicals he was mixing [as part of his job] "could be a bomb." (2:212). At trial Clay testified that she had heard Wilson say that only once. (2:214). A few days after her conversation with Cunningham, and still before Wilson's discharge. Wartinger and Cunningham interviewed Clay in the personnel office. Cunningham asked if Clay knew anything about Wilson's harassing anyone. Clay answered no. When Cunningham said she was more concerned about the knife incident, Clay replied that she had not seen it. All she saw, Clay told them, was that Ann Hurley jumped, calling out, "Teomi, make him stop," following which both Hurley and Clay laughed. After Wartinger and Cunningham looked at each other, Cunningham told Clay, "That's all we wanted," and the interview ended. Apparently no written statement was secured from Clay. (2:209).

Wilson denies ever using the word "bomb" in relation to the chemicals at work (2:174-175), and he denies

ever teasing Hurley (2:184). He asserts that he told Cole he was not threatening Carrington with the handsaw. (2:130, 190). He denies telling anyone that he planned to hit Bradberry with the 2x4. (2:181). When Cole asked what he was doing with the 2x4 in his area, Wilson explained (apparently) that he used it to raise pallets that had fallen between the racks. Cole did not tell him to dispose of the 2x4. Wilson asserts that he was upset when Bradberry, driving a forklift on this occasion in august, hit a pallet stacked with merchandise, almost pushing the pallet into Wilson. Bradberry then laughed. Wilson claims, however, that he was not "extremely" upset and that he took no action other than to tell Bradberry not to do it again. (2:131, 177-184).

c. Discussion

Crediting DC Manager Ferguson, Jeananne Cole, and Ann Hurley, and disbelieving S. Phillip Wilson, I find that the General Counsel has failed to establish, prima facie, that a motivating reason for AutoZone's discharge of Wilson was his activities on behalf of the Union. I therefore shall dismiss complaint paragraph 12.

Although Teomie Clay generally supports Wilson, she concedes she never saw a cardboard knife, yet Wilson admits that he "showed" one to Hurley. I credit Hurley that 90 percent of the time no one was around when Wilson made his threats. I also find that Clay observed more than what she admits seeing. What had started as an apparently innocent interest by Wilson in Hurley's family developed into some kind of morbid fixation by

Wilson resulting in his psychological bullying and terrorizing of Hurley. As Hurley describes it, Wilson began acting "weird" and "not normal." (4:738). Other than discussing the matter with her husband, Hurley did not report the threats to management out of fear it could provoke Wilson. She endured the threats in order to protect her daughter. (4:717, 733-734). Whether most would have reacted as did Hurley is debatable, but I credit Hurley. In doing so I recognize that at work she may have joined the banter more than she allows, at least before matters became serious. Nevertheless, I find that Hurley eventually became seriously concerned, finally reporting the matter when, during the investigation initiated by management after the bomb threat in August, management interviewed Hurley.

In any event, it is clear that Ferguson had before him reports alleging serious misconduct by Wilson. Although Ferguson did not personally interview Jeananne Cole, he read her statement of August 31. He likewise read Hurley's September 9 statement and personally interviewed her. It is clear that Hurley's statement, and the personal report she made to him, figured heavily in Ferguson's decision to recommend Wilson's discharge – a recommendation accepted by Vice President Roberts. Consistent with AutoZone's past practice, at least at Greenville, Wilson was not confronted until his discharge interview. At that interview Wilson, I find, admitted the three incidents but asserted he had meant no harm by his conduct. (Had he denied them Ferguson would have cited some of the additional incidents.) But what was a

(morbid) joke to Wilson was no laughing matter to Ferguson or to AutoZone, and Ferguson fired Wilson. Crediting Ferguson, I find that Wilson's union activities were not a motivating reason for Wilson's discharge. Accordingly, I shall dismiss complaint paragraph 12.

IV. THE UNION'S OBJECTIONS

A. Introduction

As I mentioned in the Overview section of this decision, the Regional Director assigned for hearing Union Objections 1-3, 5-8, 11, and 14. For the most part these nine objections parallel allegations in the complaint, and on brief the Union generally relies on the evidence submitted in support of the complaint allegations as also sustaining its objections.

B. The Objections

1. Objection 1

This objection attacks the February 19 speech of CEO J.R. Hyde III as threatening plant closure and loss of jobs. Having found merit to complaint paragraphs 8(j) and 8(k), I also find merit to Objection No. 1.

2. Objection 2

This objection alleges that during the critical period AutoZone hired more than 30 replacement employees, assigned 50 additional managers, and advertised in local newspapers for new warehouse employees. Supervisors

threatened employees that the new employees were hired to replace current employees who supported the Union and would permanently replace current employees if the Union were selected as the bargaining agent. On brief the Union's entire one-sentence presentation cites the evidence presented in support of complaint paragraph 8(i), particularly the testimony of employee Karen Holcombe at 3:411. As discussed earlier, finding Holcombe's testimony unreliable, I dismissed complaint paragraph 8(i). In the face of testimony by DC Manager Ferguson showing that the newspaper advertisements (such as CPX 9) and additional hires (some being hired after the election) were not unusual (3:520-522), the Union apparently has abandoned this position of its objection. Finally, the Union fails to cite any evidence about 50 managers. The record shows that some managers were brought in for training and to assist during the campaign. The Union fails to articulate anything objectionable in this. I shall recommend that Objection No. 2 be overruled.

3. Objection 3

This objection alleges that AutoZone distributed literature to employees and gave captive audience speeches threatening employees with strikes and loss of jobs if the Union were selected. Respecting the literature, the Union relies, apparently, on a February 16, 1993 letter (CPX 8) to employees from Vice President Roberts. For the captive audience speeches, the Union, on brief, fails to cite any complaint allegation or evidence on which it relies. At trial the Union, during is case in chief, asked Ferguson about remarks by Roberts made following the January 22

captive Audience speech. In these tape-recorded remarks (CPX 1 at 29-30; 3:504-507), Roberts, answering questions by employee Les Hayes, states that if no contract is reached in bargaining there are repercussions, such as a strike, which hurt everybody.

Similarly, at trial the Union focused on statements by Ferguson and Roberts at the February 1 captive audience speech. (CPX 7; 3:507-514). At page 14 of that joint 28-page speech Ferguson refers to "button wearers" and asks whether they are "really the type of people you want running the union's show in here if the Teamsters are somehow able to dupe enough AutoZoners to vote for them and to get in here?" Continuing, Ferguson rhetorically asks, "Are they the kind of leaders you want to entrust your jobs and your futures to? Are they the people you want speaking for you? You can keep yourselves free of their control and the control of the international by voting *NO*!"

At page 15 of the February 21 speech Roberts, discussing strikes, states, in part: "The main reason we are opposed to the Teamsters getting in here is because this union *means strikes*. Our own management has fought its way through Teamsters' strikes time and time again. In every case, the strikers *lost everything*, and the company was hurt too. The only people not hurt were the outside Teamsters organizers."

That leads to the February 16 letter which the Union also cited at trial. (3:515-516, 534-535). The letter describes AutoZone's personal experience in dealing with the Teamsters. The text of Roberts' letter, addressed individually to employees, reads (CPX 8):

> As you know, AutoZone is a totally non-union company, and it has been that way since its found [sic] thirteen years ago. But don't let that fact lead you to believe that we are "babes in the woods" when it comes to dealing with the Teamsters. When I and lots of other members of your management team – including Peter Formanek, Tom Hanemann, Ken Jones and John Williams – were with AutoZone's former parent company, Malone & Hyde, we had *plenty* of experience dealing with the Teamsters. Unfortunately, that experience turned out to be disastrous for hundreds of our employees.

Here is a recap of the history we had with the Teamsters:

> *Nashville* – Shortly after we purchased this warehouse, the Teamsters convinced the employees that they could not trust our management to be fair to them, and the employees voted *for* the Teamsters. As we were legally required to do, we bargained with the union and eventually reached agreement on a contract. Things went reasonably well for a short while, but then one of the Teamsters' stewards got upset with us over the discharge of one of his buddies, and pulled the 185 employees out on an *illegal strike* in violation of the contract. We did not wait around to see what would happen next; we *fired* every striker and hired new employees to take their place. We never missed an order or a shipment, and the *185 fired strikers* never got their jobs back.
>
> *Memphis* – The Teamsters got into our hometown warehouse longer ago that anyone can remember – at least *50* years ago. These employees also thought that they needed the

Teamsters to have *job security* and that they had *nothing to lose* by having the Teamsters as their representative. Unfortunately, they found out the *hard way* that having the Teamsters is no guarantee of real job security. These employees, just like the ones in Nashville, walked out on an illegal wildcat strike. We *fired* all of them, too, and hired new employees to fill their jobs. We *never* missed and [sic] order or a shipment, and the fired strikers never worked for us again.

Sikeston, MO – The employees at our Sikeston warehouse were also represented by the Teamsters. Unfortunately, the Teamsters called the employees out on *strike* to try to *force* their contract demands on us. The strike did not work, however, because we *never* gave in to the Teamsters' demands; we *never* missed an order or a shipment, and we *replaced* all of the strikers with new employees. To this day, those replaced strikers have never returned to work at the warehouse.

All of these stories had one thing in common – the Teamsters Union! And, unfortunately, all of those stories had one common result: *strikes* which ended up being disastrous for the employees involved. By the way, each of these stories had the same final outcome – the Teamsters Union was eventually *kicked out*, and all of these warehouses are now *now-union* [sic].

It seems pretty clear that the Teamsters' record of dealing with your management team has not been very good. Whatever the reasons for this, we just haven't had good experiences when our employees have decided to turn their working lives and their futures over to this union. Maybe the reason for this is that we have

> taken a non-nonsense [sic] business approach to unions and that we have *never* let the Teamsters' union run our business. We run AutoZone today, and we will run it after March 5, no matter what the results of the election are.
>
> Some of you in the group meetings have asked *why* we have taken such a strong stand on this issue and why we have insisted that we don't think it would be the best thing for *you* to bring the Teamsters in here. Well, now I hope you understand the reasons. The people who were hurt the worst by the strikes in Memphis, Nashville and Sikeston weren't the management team, but the employees. We do *not* want to take a chance on the same kind of strike happening at the Greenville D.C. or anywhere else for that matter. We want to be *free* from union problems like the ones the Teamsters have caused for employees we have worked with in the past. We do *not* want to take a chance on this union doing to you *and* to us the same thing they did to us and to our employees in Nashville, Memphis and Sikeston. Remember, the only was [sic] you can *guarantee* that you will *never* get caught up in a Teamsters' Union strike or other Teamsters' trouble is by voting *NO* on March 5.

These February 1 (speech) and February 16 (letter) remarks merely describe AutoZone's experience with the Teamsters. Finding nothing objectionable in AutoZone's reporting that experience to its Greenville employees for their edification, I shall recommend that the Board overrule Objection No. 3.

4. Objection 5

In this objection the Union alleges that, in captive audience meetings, that AutoZone was withholding a scheduled wage increase because the Union, supported by employees, filed the representation petition. On brief, the Union relies on the evidence adduced in support of complaint paragraphs 8(b) and (c) [which I dismissed], 8(f) [merit, respecting Roberts' January 22 speech], 8(h), (i), and (r) [all three dismissed], and 9 [merit respecting the 8(a)(3) allegation on the pay increase]. Because I found merit to complaint paragraphs 8(f) and 9, I shall recommend that the Board sustain this objection.

5. Objection 6

This objection alleges that AutoZone discriminated against union activists by placing them on more onerous work schedules and changing job assignments solely because of their visible and known support for the Union, denying these union activists the ability to attend employee seminar sessions on paid time unless they disavowed support for the Union. Once a known union activist verbally disavowed his or her support for the Union, AutoZone permitted their attendance at such paid seminars with other employees. On brief the Union relies on complaint paragraph 8(i) [which I dismissed] "and the testimony of employee Stanley Phillip Wilson at Transcript pages 124 to 125."

First, recall that beginning the week of February 1 AutoZone excluded from its meetings those employees who had a fixed opinion on the union issue. (5:925, 974,

979). Respecting a discriminatory exclusion of union activists, there is no evidence that AutoZone required activists to disavow support for the Union, and DC Manager Ferguson denies knowledge that any supervisor ever said it. (5:928). Ferguson also testified that union supporters were permitted to attend if they merely said they wanted information to determine whether their decision to support the Union was correct. (3:525, 528-529). This also is consistent with Advisor Timothy Schlichting's report to Phillip Wilson when Wilson, as I described earlier, asked why he could not attend the meetings. Thus, on February 15 Schlichting informed Wilson that Ferguson said Wilson could not attend because his mind was not open. (2:125-126, 168). Wilson makes clear that his opinion was fixed. (2:151-152). It is well settled that both unions and employers may exclude opponents from their meetings. ***Teamsters Local 856 (Holiday Inn)***, 302 NLRB 572 (1991); ***Luxuray of New York***, 185 NLRB 100 fn. 1 (1970).

Second, the only "onerous" aspect is that Wilson also had to cover the job of an employee called to the meetings, but this happened only for one hour per week in four separate weeks. (5:926, 929, 981-982). That hardly rises to the level of objectionable conduct. I shall recommend that Objection No. 6 be overruled.

6. Objection 7

By this objection the Union complains that AutoZone's supervisors and managers threatened union activists with loss of their jobs and coercively interrogated union activists because of their support for the Union. In

support of the objection, the Union relies on complaint paragraphs 8(d), (h), (i) [all three dismissed] and 8(j) and (k), the Hyde speech respecting which I found merit. Based on my findings respecting CEO Hyde's February 19 speech, I shall recommend that the Board sustain Objection No. 7.

7. Objection 8

This objection alleges that AutoZone solicited employee grievances and promised remedies and benefits. On brief the Union relies on complaint paragraph 8(c) and (r) [I dismissed both] and paragraph 9 [merit found to 8(a)(3) allegation on withholding scheduled pay raise]. As the withholding of the pay raise does not promise a benefit, and paragraphs 8(c) and (r) are being dismissed, I shall recommend that the Board overrule this objection.

8. Objection 11

This objection alleges that AutoZone permitted employees to circulate antiunion petitions during work time and gave other material support to antiunion employee while verbally reprimanding union activists for speaking to employees at work and while removing union literature from bulletin boards where general employee communications are normally permitted. On brief the Union relies on complaint paragraphs 8(d), (g), (n), and (o) [merit found to each]. I shall recommend that the Board sustain this objection.

9. Objection 14

In this "catch-all" objection the Union alleges "other" coercive conduct during the critical period. On brief the Union relies on a statement by Marty Nelson that, after a union loss in the election, she and the other (open) union supporters "would be considered anticompany." (1:54-55). Nelson, recall, is the assistant manager from San Antonio who was at Greenville to train and to assist. (4:602-603). Nelson denies knowing Hanson (4:600) or having a conversation with any employee, other than James Andrews, who was wearing union insignia. (4:600-601). I credit Hanson.

Hanson testified that Nelson had been working in the department for several days. He was assisting in pulling orders on this occasion. (1:54, 58). Hanson is certain Nelson was aware of her union support. (1:56) Hanson had openly worn union insignia, had handbilled for the Union, and was the first of 32 employees named as members of the Union's organizing committee in the Union's February 1 letter (GCX 4) to Ferguson. Finally, on this occasion Hanson was wearing her union pin. (1:54). I find that Nelson knew Hanson and knew that she was an open and vigorous supporter of the Union. On this occasion, Hanson testified, Nelson asked Hanson if she was on the Committee. Hanson replied yes. To this Nelson asked, "Well, what do you think is going to happen when you lose the election?" [Recall, as I found, that Nelson asked James Andrews the same question.] In a joking (not "jerking" as the transcript reflects) fashion, Hanson replied that AutoZone probably would "fire us all." "No,"

Nelson stated, but they "would be considered antiCompany." Hanson considers Nelson's remark to be a threat of future retaliation. (1:59).

Although I credit Hanson rather than Nelson, I shall recommend that the Board overrule Objection No. 14. There is no evidence other employees overheard Hanson's remark or that she told any employees about it. In view of the lopsided vote (135 No. 57 yes), it is clear that, even if Nelson's remark had frightened Hanson into voting No, a single No vote would not have affected the results of the election. Thus, Nelson's remark, even if objectionable, was isolated and insignificant. ***Gold Shield Security,*** 306 NLRB 20 (1992).

C. Recommendations

Based on the foregoing, I recommend that the Board overrule Objections 2, 3, 8, and 14, that it sustain Objections 1, 5, 7, and 11, and that the Board set aside the March 5, 1993 election in Case 11-RC-5894 and direct that a second election be conducted.

Conclusions of Law

By engaging in various acts, from January 20, 1993 through mid-February 1993, constituting interference, restraint, and coercion of its employees, Respondent AutoZone has violated Section 8(a)(1) of the Act.

By freezing its pay adjustment process because the Union filed a representation petition on January 7, 1993 in Case 11-RC-5894, Respondent AutoZone has violated Section 8(a)(3) and (1) of the Act.

The unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

AutoZone artificially interrupted its processing of the wage adjustment process for its Greenville, South Caroline distribution center, while continuing with it for its other distribution centers, because on January 7, 1993 the Union filed a representation petition in Case 11-RC-5894. As of the time AutoZone ceased its wage adjustment process for its Greenville facility, the preliminary indication was that a weighted increase would exceed 5 percent at Greenville. AutoZone must be ordered to complete its wage adjustment process, as if the Union had not appeared on the scene, and implement whatever wage increase is, in good faith, approved, retroactive to January 3, 1993 – the date it would have been effective had one been implemented at Greenville. (4:842-843). ***Atlantic Forest Products,*** 282 NLRB 855, 859 fn. 21 (1987); ***Otis Hospital,*** 222 NLRLB 402, 405 (1976). The money due shall be computed at the compliance stage. Interest, likewise computed at the compliance stage, shall be computed in accordance with ***New Horizons for the Retarded,*** 283 NLRB 1173 (1987). The backpay so computed shall be due to all eligible employees, including any eligible employees who have since left AutoZone's employment.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The Respondent, AutoZone, Inc., its officers, agents, and representatives, shall

1. Cease and desist from

a. Removing prounion literature from canteen bulletin boards while leaving posted anitunion literature.

b. Imposing a gag order on all working-time talk about unions (supporting or opposing) while permitting employees to discuss other nonwork topics during working times.

c. Threatening employees with closure of the Greenville, South Caroline facility if they select the Teamsters Union as their bargaining representative.

d. Threatening employees with loss of jobs if they select the Teamsters Union as their collective bargaining representative.

e. Telling employees that a pay raise is being withheld because the Teamsters Union filed a representation petition.

---

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, *29 CFR 102.46,* the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, *29 CFR 102.48,* be adopted by the Board and all objections to them shall be deemed waived for all purposes.

f. Freezing the wage adjustment process because a labor organization has filed a petition to represent employees for the purposes of collective bargaining.

g. In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

a. Complete the wage adjustment process for the distribution center at Greenville, South Carolina, which process was frozen at Vice President Dennis Roberts' level in early January 1993 on the filing of the petition in Case 11-RC-5894, and implement the pay increase there effective January 3, 1993, with interest.

b. Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

c. Post at its Greenville, South Carolina facility copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional

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[5] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Director for Region 11, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

d. Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

e. **IT IS FURTHER ORDERED** that complaint paragraphs 8(a), (b), (c), (e), (h), (i), (l), (m), (r), and 10, 11, and 12 are dismissed.

Dated Washington, D.C. March 28, 1994

/s/ Richard J. Linton
Richard J. Linton
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT remove prounion literature from canteen bulletin boards while leaving posted antiunion literature.

WE WILL NOT impose a gag order prohibiting, during working time, all talk about unions (supporting or opposing) while permitting employees to discuss other nonwork topics during working time.

WE WILL NOT threaten you with closure of the Greenville, South Carolina facility if you select the Teamsters Union as your bargaining representative.

WE WILL NOT threaten you will [sic] loss of jobs if you select the Teamsters Union as your collective bargaining representative.

WE WILL NOT tell you that a pay raise is being withheld because the Teamsters Union filed a representation petition.

WE WILL NOT freeze the wage adjustment process because a labor organization has filed a petition to represent employees for the purposes of collective bargaining.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL complete the wage adjustment process for the distribution center at Greenville, South Carolina, and

WE WILL implement the pay raise retroactive, with interest, to January 3, 1993 for all eligible employees, including eligible employees who no longer work for AutoZone.

AUTOZONE, INC.

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's office, 251 North Main Street, Room 447, Winston-Salem, NC 27101-3986, Telephone (910) 631-5212.

Supreme Court, U.S.
FILED
SEP 20 1996
CLERK

No. 96-116

In the Supreme Court of the United States

OCTOBER TERM, 1995

AUTOZONE, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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30 pp

QUESTION PRESENTED

Whether substantial evidence supports the findings of the National Labor Relations Board that: (1) petitioner's decision to withhold a planned and expected wage increase during a representation election violated Section 8(a)(3) of the National Labor Relations Act (Act), 29 U.S.C. 158(a)(3); (2) a speech by petitioner's Vice-President blaming that withholding on the Union violated Section 8(a)(1) of the Act; and (3) a speech by petitioner's Chief Executive Officer threatening closure of the plant if the Union won the election and permanent job losses following a strike violated Section 8(a)(1) of the Act.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	9
Conclusion	16

TABLE OF AUTHORITIES

Cases:

Atlantic Forest Prods., Inc., 282 N.L.R.B. 855 (1987)	7, 11, 13
Bowling Green-Warren County Community Hosp. v. *NLRB*, 756 F.2d 41 (6th Cir. 1985)	11
Cutter Labs., Inc., 221 N.L.R.B. 161 (1975)	13
Emory Nursing Home, Inc., 260 N.L.R.B. 540 (1982)	11
Free-Flow Packaging Corp. v. *NLRB*, 566 F.2d 1124 (9th Cir. 1978)	12
Graver Tank & Mfg. Co. v. *Linde Air Prods. Co.*, 336 U.S. 271 (1949), aff'd on reh'g, 339 U.S. 605 (1950)	11
Great Atlantic & Pacific Tea Co., 192 N.L.R.B. 645 (1971)	13
Hovey Elec., Inc., 302 N.L.R.B. 482 (1991), enforcement granted in part and denied in part on other grounds, 964 F.2d 543 (6th Cir. 1992)	13
J.J. Newberry Co. v. *NLRB*, 645 F.2d 148 (2d Cir. 1981)	11-12
Laidlaw Corp., 171 N.L.R.B. 1366 (1968), enforced, 414 F.2d 99 (7th Cir. 1969), cert. denied, 397 U.S. 920 (1970)	15
Larson Tool & Stamping Co., 296 N.L.R.B. 895 (1989)	8

Cases—Continued: Page

Mobil Oil Corp. v. *Federal Power Comm'n*, 417 U.S. 283 (1974) 11
NLRB v. *Gissel Packing Co.*, 395 U.S. 575 (1969) ... 14
NLRB v. *Industrial Erectors, Inc.*, 712 F.2d 1131 (7th Cir. 1983) 12
NLRB v. *Otis Hosp.*, 545 F.2d 252 (1st Cir.), enforcing 222 N.L.R.B. 402 (1976) 11
NLRB v. *Planters Peanuts*, 574 F.2d 400 (8th Cir. 1978) 12
NLRB v. *Service Garage, Inc.*, 668 F.2d 247 (6th Cir. 1982) 11
Plasticrafts, Inc. v. *NLRB*, 586 F.2d 185 (10th Cir. 1978) 12-13
Uarco, Inc., 169 N.L.R.B. 1153 (1968) 13
United States v. *Johnston*, 268 U.S. 220 (1925) 10-11

Statutes:

National Labor Relations Act, 29 U.S.C. 151 *et seq.*:
§ 7, 29 U.S.C. 157 2
§ 8(a)(1), 29 U.S.C. 158(a)(1) 2, 5, 7, 12
§ 8(a)(3), 29 U.S.C. 158(a)(3) 2, 5, 10
§ 8(c), 29 U.S.C. 158(c) 14

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-21) is unpublished, but the decision is noted at 83 F.3d 422 (Table). The decision and order of the National Labor Relations Board (Pet. App. 25-28), and the decision of the administrative law judge (Pet. App. 29-164), are reported at 315 N.L.R.B. 115.

JURISDICTION

The court of appeals entered its judgment on April 24, 1996. The petition for a writ of certiorari was filed on July 22, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 7 of the National Labor Relations Act (Act) guarantees employees "the right to self-organization, to form, join, or assist labor organizations, * * * and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. 157. Section 8(a)(1) of the Act makes it an "unfair labor practice" for an employer "to interfere with, restrain, or coerce employees in the exercise of th[ose] rights." 29 U.S.C. 158(a)(1). Section 8(a)(3) further prohibits employers from "discrimination in regard to * * * any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. 158(a)(3).

2. a. Petitioner distributes and sells automotive parts throughout the United States. In late 1992, the General Drivers, Warehousemen and Helpers, Local Union No. 28, International Brotherhood of Teamsters, AFL-CIO (Union) began an organizing campaign at petitioner's Greenville, South Carolina distribution center. Pet. App. 2. When the company refused to recognize the Union, the Union filed a representation petition with the National Labor Relations Board (Board). The Board subsequently scheduled a representation election for March 5, 1993. *Ibid.*

b. Petitioner annually adjusts the pay for employees at its distribution centers. Pet. App. 60; see also *id.* at 3. The adjustment depends upon a wage survey, which determines whether the company's wages are competitive in that area. Because it depends upon a study of regional factors, the wage adjustment may vary from one distribution center to another. Fur-

thermore, no adjustment is guaranteed if the survey reveals that the current pay scale is competitive. *Id.* at 60-61; see also *id.* at 3.

In November 1992, petitioner's Vice-President, Dennis Roberts, visited the Greenville distribution center. In response to questioning by employees, Roberts stated that he expected them to receive a wage increase of between four and five percent, but this had not yet been confirmed. Pet. App. 4. Roberts reiterated this expectation two weeks later. *Ibid.*

By early January 1993, a wage survey for Greenville had been completed, which demonstrated that a wage adjustment in excess of five percent was appropriate. Pet. App. 5, 63. This information, along with survey data for petitioner's other distribution centers, was submitted to Roberts in early January. On January 11, 1993, Roberts recommended, and the petitioner's President approved, wage adjustments for all of petitioner's distribution centers, except Greenville. *Id.* at 4-5, 62.

On January 22, 1993, Roberts delivered a speech to the Greenville employees in opposition to the Union's representation petition. Addressing the withholding of the wage adjustment, Roberts stated:

> A number of you have asked when or if the 4 to 5 percent increase we had mentioned back in December would be going through. You need to understand that the numbers we mentioned in December were a tentative forecast only. After that time, we decided to re-evaluate the pay situation in this market. Before we were able to gather all the data we needed and reach a final decision, however, the Teamsters' petition came in. Our understanding of the law is that we cannot make changes in the

> pay or benefits once a petition comes in, unless the decision had been finalized beforehand. We very much regret that the union's poor timing has now tied our hands, but we do not intend to violate the law. The thing to keep in mind, though, is that once the union is beaten in the election—and we feel confident that is exactly what is going to happen here—then we will be able to move forward, free of the restrictions that we now live under.

Pet. App. 5-6. In a question-and-answer session following the speech, Roberts told the Greenville employees that the average pay increases being implemented that day at the other distribution centers ranged from twelve to fifteen percent. *Id.* at 20, 104.[1]

c. On February 19, 1993, approximately two weeks before the election, petitioner's Chairman and Chief Executive Officer, J.R. Hyde, delivered a speech to the Greenville employees. Hyde stated that the Union strikes "100 percent of the time," and then continued:

> Nobody wins a strike. At each of the cases I mentioned, both the company and [the Union] survived the strike and are still around. [The distribution center in] Nashville is still operating today full bore. So is Sikeston and so is Memphis. The only part of the equation not still there are the employees who allowed the Teamsters to call them out on strike. * * * [T]he 185 strikers at our

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[1] The court of appeals initially attributes this statement to another employee (Ferguson). Pet. App. 6. The Board found, however, that Roberts made the statement, and this was not a fact in dispute. *Id.* at 104. The court of appeals corrected its error later in the opinion, correctly attributing the statement to Roberts. *Id.* at 20.

> Nashville warehouse who walked out on an illegal wildcat strike were all fired. Those 185 employees did not get to vote. Not one of them has ever gotten his job back. The strikers in Memphis and Sikeston were all replaced, and none of them have gotten their jobs back to this day. In fact, there is no union today in the Nashville [distribution center], the Sikeston [distribution center], or the Memphis [distribution center].

Pet. App. 8-9. Hyde concluded: "[The Union's] record with me and your management team is just about as bad as you can get. * * * I know, as sure as I'm standing here, that if I let anyone—here or anywhere else in this company—think [the Union] is in charge, I might as well close the doors, put a lock on the gate, and throw away the key. I will not let [the Union], with [its] record and [its] own agenda, destroy what you and I have built." *Id.* at 9-10.

d. The Board conducted an election among the Greenville employees on March 5, 1993, as scheduled. The Union lost the election by a vote of 135 to 57. Pet. App. 2.

2. On November 9, 1993, the Board's General Counsel issued a complaint against petitioner alleging, among other things, that petitioner's decision to withhold the scheduled wage increase from the Greenville employees violated Section 8(a)(3) of the Act, and that Roberts' and Hyde's speeches to the Greenville employees violated Section 8(a)(1) of the Act. Pet. App. 34-35, 58, 80.

a. Following a hearing, the administrative law judge (ALJ) found that petitioner violated Section 8(a)(3) of the Act by withholding a planned and expected pay adjustment because of the Union's petition

and the union activities of Greenville employees. Pet. App. 158, 159. The ALJ specifically found that Roberts was not a credible witness and rejected as untrue Roberts' assertion that the pay adjustment process was frozen on the advice of counsel and arose from a concern that implementing the increase during an election campaign would have been illegal. *Id.* at 107. Instead, the ALJ found that "a motivating factor in [petitioner's] failure" to go forward with the pay adjustment "was the fact that the employees had assisted the Union and [petitioner] wanted to postpone the Greenville pay increase in order to help defeat the Union at the election which would be held." *Id.* at 108; see also *id.* at 107 ("Roberts put aside his analysis of the Greenville [distribution center] pay raise matter * * * not because of any concern over the legality of implementing a pay increase at Greenville, but because of a desire to exploit the pay raise issue in the election.").

The ALJ further found that Roberts' representation to the employees that the pay increases implemented at the other distribution centers averaged from twelve to fifteen percent was, if not "false," then "at best * * * misleading" (Pet. App. 104, 106), and that this misrepresentation was "no accident, but a deliberate attempt to deceive" the Greenville employees and to "tantaliz[e] his listeners at Greenville about averages elsewhere of 12 to 15 percent, in conjunction with * * * reciting how the pay increase matter had to be set aside because of the 'poor timing' of the Union's petition." *Id.* at 106. "Roberts did this," the ALJ concluded, "as part of [petitioner's] strategy of inciting the anger of the Greenville employees toward the Union, and the greater the percentage of the pay raise they were

missing out on the greater their anger and the greater the chance they would vote NO on March 5." *Id.* at 106-107.

b. The ALJ also found that Roberts' January 22, 1993, speech to the Greenville employees violated Section 8(a)(1) of the Act. Pet. App. 65. Relying on "well established" Board precedent, the ALJ held that "an employer is required to proceed with an expected wage or benefit adjustment as if the union were not on the scene." *Id.* at 63 (quoting *Atlantic Forest Prods., Inc.*, 282 N.L.R.B. 855, 858 (1987)). An employer is permitted to delay a planned wage adjustment only if "the '*sole* purpose' of the postponement is to avoid the appearance of influencing the election's outcome" and the employer "avoid[s] attributing to the union the onus for the postponement of adjustments in wages or benefits, or disparaging and undermining the union by creating the impression that it stood in the way" of the employees receiving the planned adjustment. Pet. App. 63 (emphasis added). The ALJ found that Roberts' speech violated Section 8(a)(1) because "the sole purpose of Roberts' announcement * * * was to encourage a vote NO" by "blam[ing] the Union's 'poor timing' for the postponement." Pet. App. 65. "Not only would Roberts' words incite anger against the Union, and remind employees how to take revenge (beat the Union in the election)," the ALJ observed, but they also "promise[d] the thrill of victory, after the Union [was] beaten, in the form of [petitioner] being able 'to move forward, free of the restrictions that [it] now live[d] under.'" *Ibid.*

c. In addition, the ALJ found that Hyde's February speech to the Greenville employees violated Section 8(a)(1) of the Act by "unlawfully threaten[ing] loss of jobs for strikers who participate in lawful strikes."

Pet. App. 84. The ALJ explained that "employers cannot tell employees without explanation that they would lose their jobs as a consequence of a strike or permanent replacement." *Id.* at 83 (quoting *Larson Tool & Stamping Co.*, 296 N.L.R.B. 895 (1989)). Rather, employers must clarify that replaced employees may be placed on a preferential hiring list and will be recalled when a permanent replacement leaves the position. Pet. App. 83 n.3. Hyde's description of what had happened to strikers at the other distribution centers, when combined with his statement that "the Teamsters strike '100% of the time,'" the ALJ found, left the "clear" "overall message" that "a successful vote for the Union means that there will be a strike, that the strikers will be replaced, and that the replaced strikers will lose their jobs." *Id.* at 84. The ALJ further found that Hyde's statement about closing the company's doors was unlawful because it "threatens to retaliate for a Union victory by closing the plant." *Id.* at 86.

d. On September 30, 1994, the Board affirmed the ALJ's findings and ordered petitioner to complete the wage adjustment process for the Greenville distribution center and to implement it retroactively. The Board also set aside the results of the March election and ordered a new election. Pet. App. 25-26, 158-159.[2]

3. In an unpublished decision, the court of appeals enforced the Board's order. Pet. App. 1-21. The court

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[2] The Board also agreed with the ALJ that petitioner had committed numerous other unfair labor practices during the Union's organizing campaign, including removing Union materials from company bulletin boards and imposing a "gag rule" on employee conversations about the Union. Pet. App. 25, 52-55, 69-72. The court of appeals upheld these findings, *id.* at 12-15, and petitioner does not challenge them here.

held that substantial evidence supports the Board's factual findings and that there are no legal errors in the decision. *Id.* at 12. Specifically, the court of appeals ruled that the "record fully supports" the Board's finding that anti-union animus underlay petitioner's decision to withhold the pay adjustment. *Id.* at 18. The court further found "supported by the record" the Board's determination that "Roberts exploited his decision and the resulting wage adjustment denial, using it as a weapon during his January 22 speech." *Id.* at 20. Petitioner's contrary argument that Roberts acted to avoid the appearance of unlawful vote buying was rejected by the ALJ and, the court noted, "[petitioner] has failed to show any basis for disturbing th[at] credibility determination[]." *Ibid.*; see also *id.* at 21 ("the record supports the Board's finding that [petitioner] suspended its anticipated wage adjustment procedure because the employees had assisted the Union and because [petitioner] wanted to postpone the pay increases in order to help defeat the Union at the election"). Finally, the court of appeals concluded that "the record substantially supports [the Board's finding] that Chairman Hyde's speech contained both a threat of plant closure and permanent loss of employment." *Id.* at 16-17.

ARGUMENT

Petitioner's argument is premised on factual assertions that are contrary to the facts found by the ALJ, adopted by the Board, and affirmed by the court of appeals. Because petitioner does not challenge the legal standards employed or the application of the law to the facts actually found by the Board, and because the court of appeals' decision is correct and not in

conflict with the ruling of any other circuit, further review is not warranted.

1. Petitioner's principal contention (Pet. 15-25) is that the court of appeals erred in finding that petitioner's decision to withhold the wage increase from the Greenville employees was unlawful under Section 8(a)(3) of the Act. Petitioner claims that it had no established practice of granting wage adjustments and that it acted out of a fear that the wage increase would be perceived as illegal vote buying.

These factual contentions were specifically rejected by the ALJ, the Board, and the court of appeals. The court of appeals, like the Board, rejected petitioner's claim that its wage adjustment history was "erratic in both timing and amount." Pet. App. 20. The court found instead that "there had been an annual average adjustment at Greenville in 1989, 1990, and 1991," that "there was a company wide practice of granting adjustments at all of its distribution centers in January," and that "[petitioner] led its employees to believe that some kind of wage increase would be forthcoming in 1993." *Ibid.* The court further found that Roberts' testimony that the wage adjustment was withheld out of concerns about its legality was "discredited," that the company had demonstrated no basis for disturbing that credibility determination, and that "the record supports the Board's finding that petitioner suspended its anticipated wage adjustment procedure," not because of concerns about its illegality, but "because the employees had assisted the Union and because [petitioner] wanted to postpone the pay increases in order to help defeat the Union at the election." *Id.* at 19-21.

This Court "do[es] not grant a certiorari to review evidence and discuss specific facts." *United States* v.

Johnston, 268 U.S. 220, 227 (1925); cf. *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949) ("[a] court of law, such as this Court is, * * * cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error"), aff'd on reh'g, 339 U.S. 605 (1950). The task of evaluating whether an agency's decision is supported by substantial evidence, moreover, belongs "primarily" to the court of appeals: "This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied." *Mobil Oil Corp.* v. *Federal Power Comm'n*, 417 U.S. 283, 310 (1974).

It is clearly settled law that scheduled wage adjustments cannot be withheld because of anti-union animus. See, *e.g.*, *NLRB* v. *Otis Hosp.*, 545 F.2d 252, 254-256 (1st Cir.), enforcing 222 N.L.R.B. 402 (1976); *Atlantic Forest Prods., Inc.*, 282 N.L.R.B. 855, 858-859 (1987); *Emory Nursing Home, Inc.*, 260 N.L.R.B. 540, 555 (1982). Accordingly, this Court's review is not warranted.[3]

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[3] The cases cited and discussed by petitioner (Pet. 17-20, 21-25) in an effort to demonstrate confusion in the legal standard are inapposite because they did not involve an employer whose conduct was found to have been motivated by anti-union animus. See *Bowling Green-Warren County Community Hosp.* v. *NLRB*, 756 F.2d 41, 44 (6th Cir. 1985) ("there is no substantial evidence in the present record to support a finding of intentional discrimination"; parties had stipulated that the "withholding of an increase * * * was based *solely* on the advice of counsel"); *NLRB* v. *Service Garage, Inc.*, 668 F.2d 247, 248-249 (6th Cir. 1982) (employer had no past practice of granting wage increase; employer did not attribute delay in any possible increase to union or discuss basis for postponement with employees); *J.J. Newberry Co.* v. *NLRB*, 645 F.2d 148,

2. Petitioner also contends (Pet. 11-14) that the court of appeals erred in finding that Roberts' January speech violated Section 8(a)(1) of the Act, because Roberts allegedly "was merely informing employees of [p]etitioner's obligation under the Act, which is lawful." Pet. 12.

Like petitioner's previous contention, this argument invites this Court to sit in review of factual findings made by an agency and affirmed by the court of appeals. The Board found, and the court of appeals agreed, that Roberts' speech was "part of [petitioner's] strategy of inciting the anger of the Greenville employees toward the Union." Pet. App. 106. Roberts did not merely inform employees of the legal status of their wage adjustment. He specifically blamed the Union for the withholding and "strongly implied that a vote against the Union would restore [petitioner's] freedom to grant the pay increase." *Id.* at 20.

Roberts' purported explanation of the law, moreover, was incorrect. In deciding whether to withhold a planned increase in wages, "[a] company is supposed to act as though the union were not present," *NLRB* v. *Industrial Erectors, Inc.*, 712 F.2d 1131, 1135 (7th Cir. 1983). Otherwise, "[e]mployees will predictably consider that the union is somehow responsible for their failure to receive expected raises." *Plasticrafts*,

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152-153 (2d Cir. 1981) (employer took "pains to refrain from capitalizing on the withholding" of a wage increase; "the withholding did not have an anti-union purpose or effect"); *NLRB* v. *Planters Peanuts*, 574 F.2d 400, 401, 405 (8th Cir. 1978) (per curiam) (employer acted "in good faith" and was not "trying to undermine the Union, or attempting to influence the votes of the employees"); *Free-Flow Packaging Corp.* v. *NLRB*, 566 F.2d 1124, 1130 (9th Cir. 1978) ("the circumstances were not such as to give rise to an inference of antiunion motive").

Inc. v. *NLRB*, 586 F.2d 185, 188 (10th Cir. 1978). See also Pet. App. 63 (discussing *Atlantic Forest Prods., Inc., supra*). Because the Greenville wage increase was "planned and expected" (Pet. App. 20), Roberts lawfully could have advised the employees that petitioner would move forward with the wage adjustment process without regard to the fact that a representation petition had been filed. Alternatively, petitioner could have advised the employees that it would postpone the increase until after the election, provided that the company also made clear that the postponement was solely to avoid any appearance of an attempt to influence the election and refrained from making statements designed to undermine employee support for the Union. See *id.* at 64 (discussing *Atlantic Forest Prods., Inc., supra*).[4]

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[4] Petitioner errs in asserting (Pet. 11) that *Atlantic Forest Prods., Inc.* is "contrary to previous Board law." That decision simply restated and applied principles previously established by the Board in *Uarco, Inc.*, 169 N.L.R.B. 1153 (1968). See *Atlantic Forest Prods., Inc.*, 282 N.L.R.B. at 857-859. Also without merit is petitioner's suggestion (Pet. 11 n.5, 12-13) that the finding that Roberts' speech was unlawful is inconsistent with prior Board decisions. None of the cases relied upon by petitioner involved an employer who used its decision to withhold a benefit as a means of undermining employee support for the union. See *Hovey Elec., Inc.*, 302 N.L.R.B. 482 (1991) (employer "did not attribute the decision [not to disclose a promised wage plan] to the union or the union campaign"), enforcement granted in part and denied in part on other grounds, 964 F.2d 543 (6th Cir. 1992); *Cutter Labs., Inc.*, 221 N.L.R.B. 161, 169 (1975) (evidence "does not establish that the [employer] sought to capitalize on the absence of the wage increase as an issue with which to undermine the Union"); *Great Atlantic & Pacific Tea Co.*, 192 N.L.R.B. 645, 646 (1971) (no evidence that "[the employer] in any way sought to capitalize on the absence of a wage increase by connecting

3. Finally, petitioner's contention (Pet. 27) that Hyde's February speech is protected by Section 8(c) of the Act is without merit. Section 8(c) provides, in pertinent part, that "[t]he expressing of any views, argument, or opinion * * * shall not constitute or be evidence of an unfair labor practice * * * if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. 158(c). Because his comments contained threats of reprisal through closing the plant (Pet. App. 16-17), Hyde's speech falls beyond Section 8(c)'s aegis. Given "the Board's competence in the first instance to judge the impact of utterances made in the context of the employer-employee relationship" (*NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 620 (1969)), the Board's finding of improper coercion, which was upheld by the court of appeals, raises no issue meriting this Court's review. In any event, the court of appeals' decision fully comports with this Court's precedent. See *id.* at 619 (speech improper where petitioner characterized union as "strike-happy," threatened that strike would lead to a plant shutdown, and indicated that the strike would likely leave the employees out of work).[5]

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the absence with the Union or the employees' support of the Union").

[5] Petitioner's contention (Pet. 25-26; see also Pet. 14) that, in determining whether speech was coercive, the Board and the court may examine only the written text of the speech and must ignore its implications is meritless. *Gissel*, 395 U.S. at 617 ("[a]ny assessment of the precise scope of employer expression, of course, must be made in the context of its labor relations setting * * * tak[ing] into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up

Lastly, petitioner's contention (Pet. 28-29) that Hyde's speech was not unlawful because, nearly a month earlier, unspecified "members of management" had informed the Greenville employees of their striker reinstatement rights[6] is without merit and undeserving of this Court's review. Neither the Board nor the court made a finding that management actually made these statements. In any event, given the substantial time lag between these alleged discussions and Hyde's speech, whatever information may have been conveyed at those meetings would have been nullified by Hyde's subsequent coercive statements, equating a Union victory with the inevitability of strikes and with permanent loss of employment with petitioner. See Pet. App. 17.

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intended implications of the latter that might be more readily dismissed by a more disinterested ear").

[6] See *Laidlaw Corp.*, 171 N.L.R.B. 1366 (1968) (permanently replaced economic strikers, who have made an unconditional offer to return to work, are entitled to full reinstatement when positions become available, and to placement on a preferential hiring list if positions are not available), enforced, 414 F.2d 99 (7th Cir. 1969), cert. denied, 397 U.S. 920 (1970).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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